DOCUMENT RESUME

ED 197 862 RC 011 923

TITLE	Education of Undocumented Children in Texas: A Status Report.
INSTITUTION	Intercultural Development Research Association, San Antonio, Tex.
SPONS AGENCY	Carnegie Corp. of New York, N.Y.; Ford Foundation, New York, N.Y.
PUB DATE	Oct 79
NOTE	189p.; Not available in paper copy due to publisher's choice.
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Access to Education; *Court Litigation; Educational Finance; *Educational Policy; Elementary Secondary Education; Enrollment; *Government Role; Government School Relationship; *Illegal Immigrants; Legislation; *Mexicans; State Action; State Aid; State School District Relationship
IDENTIFIERS	*Texas; Undocumented Workers

ABSTRACT

The education of undocumented children in Texas is an issue that has been sparked by public opinion and media exposure and fueled by a series of state and federal court suits challenging state and local policies which exclude these children from the benefits of tuition free public education. The controversy is based on a 1975 revision in the state law concerning student admission and subsequent calculation of a school district's state aid entitlement. Trends surfacing in the many ongoing deliberations include the individuality of the policies of each school district, the difficulty of establishing the actual number of undocumented children residing within school systems, estimation of the financial contributions which undocumented persons are making to local and state education coffers, identification of revenue sources for additional funding to include undocumented children in programs, and the impact of the exclusionary provisions on the children involved. A projection of fiscal and programmatic impacts of the enrollment of undocumented children can occur only through a systematic contextual analysis of the unique interactive aspects of the specific institution and student population involved in an individual locale. A 56 cell matrix (included) is one tool which can be used to focus upon possible resolutions of the issue. (NEC)

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A STATUS REPORT

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EDUCATION OF UNDOCUMENTED CHILDREN IN TEXAS:
A STATUS REPORT

Compiled by the
IDRA School Finance Project
October, 1979

This publication was produced with funds from grants made by the Ford Foundation and Carnegie Corporation. The opinions expressed herein are those of the author and do not necessarily reflect the positions or policies of the Ford Foundation and Carnegie Corporation, and no official endorsement by said foundations should be inferred.

FOREWORD

The education of undocumented children in Texas is an issue which has been receiving increasing attention in the media, among educational groups, and in the broader community throughout the State. Sparked by public opinion and fueled by a series of court suits challenging state and local policies which exclude these children from the benefits of tuition-free public education, the controversy has grown to significant proportions. Correspondingly, partial, inaccurate and sometimes misleading information on the issue abounds, causing at best confusion, and at worst unfounded concerns for parents, educators, and civic and social organizations throughout Texas and surrounding areas.

This report is an attempt to bring all the pieces together in the hope of contributing to an intelligent discussion and educated resolution of the issue.

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Background

The controversy surrounding policies of the State and local school districts regarding the education of children of undocumented status is based on a 1975 revision in the state law concerning admission and the subsequent calculation of a school district's state aid entitlement.

Section 21.031 of the Texas Education Code reads:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in the state who is a citizen of the United States or a legally admitted alien and who is over the age of five and not over the age of 21 on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parents, guardian, or the person having lawful control of him resides at the time he applies for admission.

Many districts throughout Texas, recognizing that the state statutes limited their focus to state policy and funding issues, were quick to follow suit, and modelled local admissions policies with language almost identical to state provisions. In the wake of growing school district awareness of the State's revised admissions statute, a pattern began to emerge wherein school systems began the systematic exclusion of undocumented children.

The districts' actions took the forms of either (1) refusing admission to children who were unable to present documented evidence of citizenship or legal residency, and/or (2) requiring undocumented children to pay tuition as a condition for their enrollment. Undocumented children who had previously been enrolled within school systems, as well as new pupils, generally were subjected to the same procedures.

Growing parental and interest group concern over the State's and local districts' exclusionary policies escalated to the point where a direct attack of the policies was launched.

Martinez v. Austin ISD

In August of 1977, the Austin Independent School District refused admission to a group of children on the basis of the district's determination that "petitioners were not legally admitted aliens within the meaning of section 21.031, Texas Education Code." The district's action was appealed to the State Commissioner of Education, whose office was empowered to rule on the issue. The plaintiffs based their appeal on a ruling by the U.S. District Court for the Northern District in Illinois in Silva v. Levi, Civil Action No. 76 C 4268, in which the federal court entered an injunction which prevented the Immigration and Naturalization Service (INS) from deporting any alien who entered the United States prior to March 11, 1977, from an independent country of the Western Hemisphere and who had a priority date for issuance of an immigrant visa between July 1, 1968 and December 31, 1976. The Silva injunction permitted such aliens to remain and be employed in the United States pending final adjudication of the lawsuit. The Commissioner's ruling issued on October 24, 1977 noted that "each of the petitioners families in this appeal has applied for immigrant visas at American consulates in Mexico, and each has been assigned a priority date reflecting the date upon which the application was approved." The Commissioner also observed that "it is undisputed that each petitioner falls within the class of persons covered by the injunction in Silva v. Levi." In assessing whether these children with Silva status were eligible for tuition free admission to the State's public schools, the Commissioner's ruling notes that it "construes the term legally admitted (as used in the state statute) to mean legally within the United States at the time admission to the public schools is sought" and concludes that "since it does not appear that INS has made any such determination (of the status of the persons included within the Silva definition) officially, and no statute, rule, or guideline to that effect has been advanced...we conclude that petitioners are legally within the United States at the present time and that the children are entitled to free admission to the public schools under 21.031, Texas Education Code."

The Commission's ruling in Martinez effectively dealt with the admission of children who fell within the legal parameters established in the Silva decision; subsequently, children who could obtain Silva letters from local INS offices were admitted to public schools throughout Texas.

Unfortunately, the issue of educating the far *greater* number of undocumented children *not covered by the Silva decision* remained unresolved. For these thousands of school children, tuition free admission into Texas public schools was still denied. Recognizing this dilemma, concerned advocates turned to the Texas court system for a more comprehensive resolution of the issue.

The State Court Challenge

Hernandez v. Houston ISD

The court challenge to the state statute occurred with the filing of *Hernandez v. Houston ISD* in February of 1977. The case itself was argued in the State's 126th District Court in Travis County, Texas. In its decision, the State Court ruled in favor of Houston ISD and the Texas Education Agency, which were co-defendants in the action. The original ruling was appealed to the Texas Supreme Court which upheld the constitutionality of the State's and school district's exclusionary policies regarding undocumented children.

Federal Court Challenges

Doe v. Plyler

Although *Hernandez* was recognized as a serious setback to the challenge of state and local policies regarding undocumented children, advocates recognized that there were alternative courses of action available. In September of 1977, a new wave of litigation was triggered with the filing of *Doe v. Plyler* in the United States District Court for the Eastern

District of Texas. In his ruling, Judge William W. Justice struck down the state and local exclusionary policy as it applied to the Tyler Independent School District, and issued a permanent injunction preventing its enforcement. The basis for his decision rested on his conclusions that "by virtue of its lack of rationality, Section 21.031 of the Texas Education Code violates the equal protection clause of the Fourteenth amendment and hence is unconstitutional." The case was appealed to the U.S. Court of Civil Appeals, Fifth Circuit and litigants are awaiting the setting of hearing dates on the matter.

Although significant as a precedent-setter, Judge Justice's ruling was restricted solely to the application of state and local exclusionary admissions procedures in Tyler ISD; by implication, the issue remained open to individual challenges in school districts throughout Texas.

Garza v. Reagan

The subsequent arena for challenging the State's and local admissions policy became Houston, Texas. Garza v. Reagan was filed in the U.S. District Court for the Southern District, Houston Division in the Court of Judge Woodrow Seales in August of 1978, wherein plaintiffs requested a preliminary injunction. Subsequent action by plaintiffs consolidated cases involving Houston, Baytown and Pasadena ISD. Although the named plaintiffs were eventually allowed to enroll in the districts, the admission of the class of undocumented children residing in Houston ISD and the nearby school districts is an issue which will be decided during a forthcoming trial. The trial on the merits of said case is now pending, with projected trial dates estimated as January or February of 1980.

Roe v. Holm

On the heels of the Houston case, children and parents from Odessa, Texas filed suit against Ector County ISD. In Roe v. Holm, filed in U.S. District Court, Western District of Texas, Midland-Odessa Division, Judge D.W. Suttle issued a preliminary injunction prohibiting the Texas Education Agency, i.e., the State, and Ector County ISD from enforcing the provisions of Section 21.031 of the Texas Education Code as it relates to children of undocumented status residing within Ector County ISD. A permanent ruling on the issue will await a trial on the merits. Trial date for hearings on the case had not been set at this writing.

Boe v. Wright

The latest challenge to state and local policies concerning admission of undocumented children occurred in Dallas with the filing of Boe v. Wright in August of 1979. The significance of the Dallas case is evolving as a result of Judge Robert Hill's decision to deny a preliminary injunction to the plaintiff class, a move which constitutes a break with precedents established in previous cases.

The Order in Boe v. Wright

The complexity of the issues in the Dallas case is reflected in Judge Hill's findings of fact. While he observes that a significant percentage of the plaintiff classes "will suffer some degree of injury from being excluded from school during the period stretching from the beginning of the school year to the trial on the merits, and that for some of the plaintiff class, this injury may be severe and no money could compensate them for the damage done," he also notes however that "the addition of 2000 to 5000 Spanish-speaking students at this time would cost Dallas ISD several million dollars" and, "any large influx of undocumented alien children could have a detrimental effect on the quality of education of the children presently attending DISD schools."

In his conclusions of law the judge posits the idea that although state and local classifications based on alienage may be subject to strict judicial scrutiny, this "rests on the assumption that the aliens in question are *legally within* this country (emphasis ours); the exclusion of those who are not legally admitted aliens therefore need not meet the exacting test of strict scrutiny." [The importance of the rejection of a strict scrutiny approach in the case lies in the difference in the criteria needed to defend a position which is being challenged in a court suit. When a court chooses to utilize a strict scrutiny approach, the burden is placed on the defendant to show a compelling interest which justifies the continued existence of a policy or practice being challenged. The alternative *rational basis test* simply requires a defendant to establish that there is a reasonable basis for the existence of the policy or practice being challenged.[7] Judge Hill also goes on to note that education is not a fundamental right which will trigger strict scrutiny. Having discarded the need for strict scrutiny, the judge feels justified in applying the rational basis test, and concludes that the State's and districts' exclusionary policies intends to address local educational needs, thus (by implication) that it is a rational action. The juxtaposition of the public interest is evident in his observation that "the public interest will be served and disserved by admissions of the plaintiffs at this time...the public interest would be served by the education of all children who live and may continue to live in Dallas. On the other hand, the public interest may be harmed in the short-run period which would be covered by a preliminary injunction if the re-allocation of already scarce resources causes the quality of education in DISD to decline."

He concludes that "after balancing the four relevant factors (probability of success on the merits, irreparable injury to plaintiffs, impact on the defendants and the public interest) this court has determined those factors militating against preliminary injunctive relief outweigh those favoring preliminary relief and therefore plaintiffs motion for preliminary injunction should be denied." No date for a trail on the merits has been set in this case.

Prospective Legal Maneuvers

In the face of the multiple challenges of the state policy, the Texas Education Agency finds itself to be a co-defendant in the aforementioned, and possibly in future cases on this issue. In response, the State through its legal counsel, the Attorney General's Office, has submitted a motion to consolidate those cases pending against it and the individual school districts in the State. The plaintiffs' consolidated response (see Appendix E) favors the consolidation of the case as it involves the State and the Texas Education Agency. They note that "consolidation for transfer purposes...would promote the just and efficient conduct against the defendants of the State of Texas and Texas Education Agency."

On the other hand, plaintiffs have stated their opposition to transfer and consolidation of cases against individual school districts on the grounds that: "(1) individual school districts have different exclusionary policies; (2) the characteristics of plaintiffs are different; and (3) the population size being affected by the exclusionary policies are different."

A hearing and subsequent decision on consolidation by the Judicial Panel on Multi-district Litigation in Washington, D.C. is currently pending, with no action anticipated prior to November or December of 1979.

A secondary question on consolidation relates to where and by whom the case consolidated will be heard--important issues to both plaintiffs and defendants involved in the litigation. Speculation that all cases against the State may consolidate with Doe v. Plyler, or Garza v. Reagan or other ongoing cases, is currently inconclusive.

Many observers propose that consolidation is a foregone conclusion and that the cases' ultimate resolution will eventually be taken to the Supreme Court level.

The Evolution of the Issues: A Discussion

A careful review of the court documents, including Plaintiffs' Motion for Preliminary Injunction, Plaintiff's Response to the Defendant's Motion to Consolidate Cases, and specific court orders reveals the evolution and growing complexity of the issues in question.

As noted in the Motion to Consolidate and the Plaintiffs' Response, the issues in many ways are similar, yet one must simultaneously recognize that the individual circumstances in the cases, i.e., plaintiffs and school systems, are concurrently unique. Although the issue of exclusion of undocumented children is the common thread in all the related cases, the individual school district policies are unique. In some cases, school systems exclude all children who are identified as undocumented; in others, undocumented children are allowed to enroll if they pay the tuition specified by the district. In still other cases, the school districts have continued to enroll undocumented children even after the 1975 revision of the state law, choosing to exclude them only when numbers became an issue.

The extent to which the enrollment of undocumented children impacts on individual school districts, at this point, is increasingly being recognized as associated with the numbers of children involved. A pattern seems to be emerging where courts have granted preliminary injunctions in those cases where the individual or the class in question is numerically small in proportion to a district's total enrollment. In contrast, in the one case where the suspect class involved several thousand students (Dallas ISD), the injunction was denied, with the fiscal impact of the proposed number of students standing out as a critical factor in the decision. Apparent in the trend is the need for the development of an impact formula which can be utilized to objectively estimate the fiscal impact of the enrollment of pupils, with provisions for incorporating costs related to the unique educational needs of undocumented children. In the absence of said devices, it seems that the tendency on the part of school systems has been to inflate the estimated impacts that the enrollment of said children will have on the programs and resources of the districts, and a corresponding move to minimize the projected impacts on the part of the plaintiffs' attorneys.

A second trend which seems to be surfacing in the ongoing deliberations is the difficulty of establishing, with any degree of accuracy, the actual number of undocumented children residing within school systems. Because of the clandestine existence forced upon undocumented families, estimates have all too often been based on what can at best be termed questionable extrapolation, and at worst mere speculation by individuals with some knowledge of immigration trends. Although some exceptions to this exist, i.e., utilization of sound research findings for approximating the number of undocumented persons within a specific locale (Houstun-North Study), the apparent absence of data on *undocumented children per se* points to the critical need for data on the issues and the eventual development of formulas for accurately projecting the numbers of children in specific locales.

Another major area of considerable disagreement lies in the estimation of the financial contributions which undocumented persons/parents are making to the local and state educational coffers. Defendants in the case, i.e., local school systems and the State, pose the argument that the admission of undocumented children constitutes a drain on financial resources allocated to educate the children already enrolled in the districts. This implies an absence of fiscal contribution for the delivery of educational services by the undocumented persons living within a community. Plaintiff attorneys, however, contend (probably accurately) that the undocumented *do* contribute to the support of local educational programs. They contend that undocumented families contribute local property taxes, either directly or indirectly through house or rental payments, and point out that property tax revenue is the major source of local revenue for supporting education. They also point out that a majority of state aid provided to school systems is obtained from the State's General Revenue Fund, which includes collections from a variety of tax sources to which undocumented persons also contribute. Needed research in this area relates to the extent to which the undocumented contribute to these various revenue sources.

The final issue entails the identification of the revenue sources for acquiring the additional funding which may be required to finance the incorporation of undocumented children into existing programs. Whereas it must be noted that some school systems in the State currently have the fiscal resources and/or tax base required to educate undocumented children, it must be recognized that many local systems which will be impacted by the enrollment of undocumented children do not have the local resources to effectively absorb any added expenses. The prospective role of state and federal specialized aid in the development of long-term solutions to the problems, therefore, cannot be over-estimated.

Another area not extensively addressed in the ongoing deliberations relates to the impact of the exclusionary provisions on the children involved. To what extent are the future life achievements of these children affected by the denial of educational opportunity for a period of five months, a year or several years? What are the economic and fiscal consequences of these children's non-attendance for the communities involved, i.e., what are the related costs in loss of future skills and/or tax revenues, in compensatory educational efforts, etc.? These, in turn, are dependent on further information concerning the prospects for the eventual acquisition of legal citizenship by the children in question, an area in which researchers are barely beginning to "scratch the surface."

The Band-Aid: Alternative Schools

Recognizing that the resolution of these critical issues may take years to achieve, humanitarian individuals and organizations have initiated the establishment of alternative schools for the children being excluded from public schools because of current state policies. The dedication and untiring commitment of these individuals and organizations concerned with the needs of children stands out in sharp contrast to the contemporary sea of self-interest and the exclusionary posture reflected by those opposing the admission of undocumented children to Texas public schools. Unfortunately, lacking sufficient fiscal and human resources to carry on their work, the alternative schools represent a band-aid on a problem of massive proportion.

As in many other areas, those concerned and involved in the deliberations focussing on the education of undocumented children are coming to a realization that the issues are complex and multi-faceted; correspondingly the resolutions are no less complex.

The Prospects

Given the current social and political climate prevalent in Texas, a prompt and comprehensive resolution of the issues seems unlikely. For this reason, one can expect to see the challenges to state and local exclusionary policies continue.

As noted earlier, some observers contend that, local challenges notwithstanding, resolution of the issues ultimately will be left to the United States Supreme Court. There are those who recognize, however, that the issue could be more effectively resolved through legislative action which would simply eliminate the current language in the statute and return it to its pre-1975 form.

How and when the issues will be resolved is, unfortunately, little more than speculation. Nonetheless, ongoing discussion and exploration which will facilitate their resolution must continue.

Thus, the challenge for all parties should evolve from the posing of critical questions to the formulation of workable solutions to the issues which are consequently raised. Anything less would constitute an injustice to the rights and the aspirations of the children involved.

Postscript

Several days after the initiation of this summary (October 20, 1979) an additional case was filed against the Port Arthur Independent School District.

In his initial ruling, Judge Joe Fisher granted an injunction mandating the admission of the students into the district and requiring that the State provide the financial support normally provided for other children enrolled in the school system. A date for the trial on the merits has not been set.

In a later development the Civil Rights Division of the U.S. Justice Department filed a brief in support of the plaintiff children in Doe v. Plyler. The friend-of-the-court brief notes that the Texas law "penalizes children, depriving them of a critically important social benefit, in order to condemn the parental actions over which the penalized children have neither control nor responsibility."

Updates on later developments will be disseminated by IDRA via bulletins or it's monthly newsletter.

THE EDUCATION OF UNDOCUMENTED CHILDREN IN TEXAS: FACTORS AFFECTING THE FISCAL AND PROGRAMMATIC IMPLICATIONS FOR SCHOOL DISTRICTS

The legal arguments surrounding the discussion of public education of undocumented children continuously make reference to the fact that the inclusion of this segment of the population will undoubtedly have both fiscal and programmatic impacts for all school districts which may be affected by court rulings on the issue.

Opponents and proponents, in their zest to protect the interests of their respective clients, all too often reduce or magnify these implications to simplistic levels, overlooking the reality that the potential affects of the enrollment of these children will be primarily dependent on the interaction of selected school district and student characteristics.

We propose that projection of fiscal and programmatic impacts of the enrollment of undocumented children can occur only through a systematic contextual analysis of the unique interactive aspects of the specific institution and student population involved in an individual locale. Every community and school district in the state of Texas is comparable in some respects to a common population; however, few would deny that geographic, regional, and historical factors make every situation unique in many respects.

Recognizing the juxtaposition of similarity and uniqueness in the school settings concerned with the implications of the mandated enrollment of undocumented children, the first task was seen to involve the identification of the major school district characteristics which would have some bearing on the costs associated with providing an educational program for said students.

After careful consideration of a variety of factors the IDRA staff concluded that only specific school district characteristics have a bearing on the extent of impact which an influx of such pupils would have on individual systems. These school district characteristics include the following:

1. the size of the total student population in a school district measured in terms of its average daily membership (ADM) or its average daily attendance (ADA);
2. the relative taxable property wealth of a school system measured in terms of its available taxable property per pupil;
3. the linguistic characteristics of teaching personnel employed by the school system;
4. the presence/absence of an operational program designed to respond to the needs of children of limited English proficiency;
5. current pupil to teacher ratios in the school system;
6. historical enrollment patterns of the receiving school system;
7. status of the physical facilities operated and maintained by the system; and

8. relative proximity of the school system to migration streams utilized by persons of undocumented status.

Although significant in themselves, school district characteristics are but one side of a complex equation in which the characteristics of the undocumented students in the district play an equally prominent role. The most significant characteristics of the undocumented student population include:

1. number of school-age eligible children residing in the school system in question;
2. the geographic dispersion of the undocumented student population within the system;
3. the relative fluency (in English and the native language) of the target population;
4. the age dispersion of the undocumented student population;
5. the prior educational experiences of the undocumented children;
6. the length of their presence in the U.S. or local community in question; and
7. the socio-economic status of the parents of the children involved.

The matrix displayed on Figure 1 suggests that each distinctive school district characteristic and significant elements of the undocumented student sub-population interact, with each cell having possible implications for the response options that are available to the school personnel.

MAJOR FACTORS IMPACTING COSTS FOR DEVELOPING/IMPLEMENTING PROGRAMS FOR UNDOCUMENTED CHILDREN
AN IMPACT PROJECTION MATRIX

SCHOOL DISTRICT CHARACTERISTICS / UNDOCUMENTED STUDENT POPULATION CHARACTERISTICS	1. Number of such pupils residing in the district	2. Dispersion of these students within the school district	3. Fluency in English/ Native Language	4. Prior Educational Experience	5. Length of presence in community	6. Age of the students	7. Socio-economic status of students' families
1. District Size (ADA)	*	*					
2. Wealth as Reflected in Tax Base/ADA	*						*
3. Personnel Characteristics (Linguistic Competencies of Instructional Staff)	*		*	*		*	
4. Pupil-teacher Ratios within the School System	*	*					
5. Presence/Absence of Language Response Program			*	*		*	
6. Enrollment Fluctuation History of the School System	*						
7. School Facility Characteristics in the Impacted School System	*	*					
8. Proximity to Concentrations of Undocumented Persons/Border Areas	*				*		

*Represents areas of significant interactions.

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Number of Undocumented Children: Its Implications for School Systems.

Perhaps the single most important factor influencing the response options which are available to school personnel is the number of undocumented children which are residing in the school system. Relatively small counts, as a proportion to the total student enrollment will minimize the extent of fiscal and programmatic adjustments that will be required to accommodate these pupils. Five children in a school system of 5,000 will necessitate very limited adjustments; on the other hand 500 new entries in the system previously mentioned would have much greater impact.

Currently the state of Texas provides assistance for school systems experiencing rapid growth; rapid growth is inturn defined as an increase of 6% or more over the previous year's enrollment level. Assuming that 6% is a level at which the state agency proposes that significant adjustments are required in a school district's operational activities, one might hypothesize that a comparable percentage of undocumented children are required to significantly impact a school district's activities.

Although the number of undocumented children as a percentage of a school district's total enrollment is a critical factor in estimating fiscal and programmatic impacts, school district wealth must also be considered an essential element in those cases where the numbers and/or ratio of undocumented children is significant.

Those districts whose taxable property wealth per pupil approximates or is below the state average wealth per student will be significantly more hard pressed to absorb the fiscal impacts which undocumented children may have on their school systems. Availability of state or federal aid for these types of school systems will be a significant factor since these monies will constitute from 50 to 90% of all revenue spent on their pupils. In contrast, wealthy school systems, may have the revenue base required to finance the added costs either through minimal tax rate increases, or the reallocation of relatively abundant fiscal resources.

A third element interacting with the numbers variable is a school district's enrollment history. In school systems experiencing significant decreases in enrollment, additional pupils may actually enable it to maintain previous state aid levels - which are based on attendance. Correspondingly, the need for classroom space may be alleviated if declining attendance has necessitated school closings, i.e., in said cases the influx of pupils may serve to replenish a dwindling supply of students.

Linguistic characteristics are also a significant factor in those cases where the numbers of undocumented children involved is large enough to require programmatic adjustments. In those school systems which have an adequate supply of bilingual teachers, minimal recruitment and related personnel acquisition issues will be raised; in contrast, those districts with relatively scarce bilingual personnel may be pressed to initiate, expand or modify recruitment efforts, and to implement temporary instructional responses utilizing available community personnel and/or bilingual paraprofessionals. The presence of an intact language response program designed to respond to the needs of limited English proficiency students may also serve to cushion the programmatic impact of increased enrollments of undocumented children. Having experience in the development and implementation of said programs may well entail but an expansion of existing efforts; on the other hand, school systems lacking an intact program will have to undergo the process of program development and may require a more intensive effort in order to institute programmatic responses to the unique linguistic characteristics of such pupils. As pointed out by a legal advocate, bilingual education is the ideal response to undocumented children who are of limited English proficiency, yet an ESL, HILT or other alternatives to bilingual education are nonetheless better than the absolute denial of a public education for these children.

A school district's geographic proximity to migration trails will most likely influence both the number and permanency of the inmigration of undocumented children. Consequently, school systems who have had experiences with infusions of undocumented families may expect to continue to experience said phenomenon with said trend changing only when job access to the undocumented undergoes a significant shift. Areas which have historically not been affected by immigration of undocumented workers may correspondingly expect minimal impacts from a court-mandated enrollment of such pupils.

Dispersion of Undocumented Student Population

A secondary student population variable which has a great bearing on the potential effects that enrollments of undocumented children will have on a school system is the dispersion of said pupils within the community. Before dealing with this intra-district issue however, it must be noted that the dispersion of the undocumented student population will in itself not reflect a "uniform" statewide distribution. Specific geographic areas and the school systems within those areas will most likely undergo varying experiences. Border areas, urban centers, and communities which have historically provided job opportunities for undocumented workers will most likely experience a larger enrollment of undocumented children.

Within school systems, geographic dispersions of undocumented children may vary in accordance with the distribution of the hispanic population within a community. Correspondingly, the specific effects on individual school campuses may also vary.

Administrative competence in management skills involving optimum utilization of facilities and personnel will have a direct bearing upon the ease with which appropriate adjustment measures will be initiated and implemented at the local district, as well as school campus levels. In those systems wherein administrators are skilled and creative, appropriate fiscal and programmatic adjustments may emerge more readily than in school systems whose administrators have difficulty initiating and implementing adaptive measures.

Students' Fluency in English/Native Language; Age; Prior Educational Experience; and Length in Community.

The student's ability to function in English will no doubt have a significant impact on the programmatic responses which will be required of a school system. Gross generalizations that the undocumented student population are universally monolingual Spanish dominant, however may prove unfounded. The number of years which the student has spent in the United States and corresponding exposure to the English language in the community setting and through the media, may well have resulted in the acquisition of some English language skills for this student population.

Other significant student population factors include age and prior educational experience. Research focussing on the learning skills of children with prior educational experience in a language other than English reflects that many skills, including reading and computational skills, are easily transferred by a student once he achieves some mastery of the second language. For this reason programmatic responses and the length of time required for students to be absorbed into existing regular programs may well vary from student to student and correspondingly from school system to school system.

The range and frequency of ages within the undocumented student population is significant in that this variable will affect the grade-level dispersion of the students in question and thus have a bearing on personnel requirements, facility needs, etc. Differential instructional needs at the elementary and secondary level will also require differentiated instructional strategies and may thus pose different problems in different school district settings.

Socio-economic Status of Families of Undocumented Children.

It has been argued by some that an influx of large percentages of undocumented children will result in increased costs to school system in areas such as the Free School Breakfast and Lunch Programs, and other school services which are designed to respond to the unique needs of children from low-income families. Although there are some data which support this premise, other researchers have begun to note that there has also been an increase in the immigration of undocumented skilled workers whose socio-economic levels resemble the economic status of other American blue collar families. If this pattern is maintained, the assumptions concerning the socio-economic status of undocumented persons may have to be re-examined, and accompanying school district projections correspondingly modified.

Conclusion

The aforementioned discussion of the interaction of selected school district and undocumented student variables was not intended to address every interaction vector in the 56 cell matrix presented. Rather, it was developed to highlight the fact that projections of fiscal and programmatic impacts for individual school systems (and ultimately the state level) will have to take into consideration a plethora of factors which impact on the issues.

The impact projection matrix is offered as but one tool which can be used to focus upon possible resolutions of the issue.

THE APPENDICES

The attached appendices are documents related to the individual court cases and include materials from:

(a) Doe v. Plyler

(b) Roe v. Holm

(c) Boe v. Wright

(d) Garza v. Reagan

Material related to the proposed consolidation of cases is also included as Appendix E.

It should be noted that the attached materials are extremely useful in presenting a more detailed examination of the issues and arguments of the aforementioned cases. Nonetheless, these appendices must be recognized as but a part of a much more extensive body of materials which incorporates transcripts of testimony, related motions, etc. These materials can be obtained by contacting the litigants or the trial courts in the respective cases.

APPENDIX A

MEMORANDUM OPINION

DOE VS. PLYLER

BEST COPY AVAILABLE

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 14 1978
MURRAY L. HARRIS, CLERK
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

J. and R. DOE, ET AL.)
)
V.) CIVIL ACTION NO. TY-77-261-CA
)
JAMES PLYLER, ET AL.)

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By

MEMORANDUM OPINION

Procedural History

This civil action began in September, 1977, when plaintiffs, a group of Mexican children who had entered the United States illegally and currently reside in Smith County, Texas,[1] sought injunctive and declaratory relief from this court by and through their parents, as next friends, against their exclusion from the public schools in the Tyler Independent School District ("Tyler I.S.D."). The defendant Board of Trustees of Tyler I.S.D. had refused to enroll any undocumented child,[2] absent a tuition fee of $1,000 per year, pursuant to section 21.031 of the Texas Education Code (Vernon Supp. 1976) ("section 21.031"). This statute provides, in pertinent part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

Although section 21.031 had been enacted in 1975,[3] the Tyler I.S.D. continued to enroll undocumented children, free of charge, until the 1977-1978 school year, when they observed the increasing number of such children. In July, 1977, fearing that the Tyler I.S.D. would become a "haven" for illegal aliens, the Board of Trustees of the school district adopted the following policy, designed to implement the statute:

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.
>
> A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

A complaint and motion for preliminary injunction were filed by plaintiffs on September 6, 1977. The complaint alleged that the Texas statute, as implemented by the Tyler I.S.D. policy, denied plaintiffs equal protection of the laws and, further, that the statute was preempted by the federal Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq.[4] On the same day, the court set a hearing on the application for preliminary injunction for September 9, and immediately notified the Attorney General of the State of Texas, the United States Attorney for the Eastern District of Texas, and the United States Department of Justice of the pendency and nature of the lawsuit.

At the September 9 hearing, the court granted the state's oral motion to intervene as a party defendant, made by and through the Attorney General. All parties, as well as the United States Department of Justice, were represented. Fearing disclosure of their identities, plaintiffs had filed their complaint under pseudonyms, and at the hearing moved for a protective order limiting the circumstances upon which, and the persons to whom, plaintiffs' true names might be revealed. The motion was granted and the order issued; however, the court advised the Department of Justice representatives that the order did not bind any officer of the United States who might desire to take action against plaintiffs and their parents for violations of the federal immigration laws.

The court thereupon proceeded to receive evidence, including testimony by the parents of the plaintiffs. Finding that plaintiffs had shown probability of success on the merits as to their equal protection claim, and that they would suffer irreparable harm should interim relief be denied, the court granted the application for preliminary injunction. Findings of Fact and Conclusions of Law were entered on September 12, 1977. A final hearing was scheduled for December 12, 1977.

The final hearing continued for two days. The State of Texas, by the Attorney General, had filed an answer and participated fully as a defendant. The United States Department of Justice, pursuant to motion, was granted leave to participate as an amicus curiae. While the attorney representing the Government questioned several of the witnesses, he did not produce any independent witnesses. Plaintiffs offered into evidence the record of proceedings at the September hearing and, in addition, presented testimony of four expert witnesses. Plaintiffs' witnesses testified on the following topics:

(1) the historical framework of illegal emigration from Mexico into the United States; (2) the general characteristics of illegal immigrants; (3) school financing in Texas; and (4) the educational needs of Mexican children. The defendant school board presented testimony from the Superintendent and Business Manager of the Tyler I.S.D. The State of Texas presented witnesses from the United States Immigration and Naturalization Service, the Texas Education Agency, and the Houston Independent School District ("Houston I.S.D."), as well as two expert witnesses, who testified as to immigration and educational needs of Mexican students. In her opening statement, the Assistant Attorney General described the nature and scope of the state's evidence:

> Basically, what we will attempt to show or what we will show is the impact on the educational system, that it impacts to the detriment of the citizens, the legally admitted child, particularly in the border areas, and the areas in which you find large Mexican-American enclaves, which Tyler is not one of those areas. That's why you don't see the impact from Tyler like you see in the Houston I.S.D., Brownsville, San Antonio, Eagle Pass, Abilene--different places around the state where there are Mexican-American enclaves, mostly the border areas.

Record of Proceedings, Dec. 12, 16, 1977 ("Tr. 12/12"), at 163. At the conclusion of the hearing and after consultation with the attorneys, the court issued a briefing schedule.

Early in January, 1978, plaintiffs moved to amend their complaint to conform to the evidence and to add the Governor of Texas and the Commissioner of Education of the State of Texas as parties to the action. The motion was granted on January 5, 1978, and the amended complaint filed the same day. More than two months later, the State of Texas filed a motion for reconsideration and a motion to present additional evidence, based on the grounds that the Attorney General's office represented neither the Governor of Texas nor the Commissioner of Education; that counsel for the state and the prospective witnesses had always assumed that the instant civil action would affect only the Tyler I.S.D. and not other school districts throughout the state; and that the evidence offered at trial had been consciously limited by this understanding.

Immediately prior to the trial on the merits, plaintiffs filed a brief which included references to the evidence they would offer at trial. The United States filed a post-trial brief, including substantial references to the evidence, in which it took the position that defendants' statute and policy violated the fourteenth amendment guarantee of equal protection of the laws, but were not invalid under the federal preemption doctrine. The United States had already submitted to the court and the parties copies of the Preliminary Report of the Domestic Council Committee on Illegal Aliens, December 1976 ("Preliminary Report"). The State of Texas chose to submit its briefs filed in a similar challenge to section 21.031, Hernandez v. Houston Independent School District, 558 S.W.2d 121 (Tex. Civ. App.--Austin 1977, writ ref'd n.r.e.)

The Hernandez case had been brought more or less concurrently with the instant action by a group of undocumented children living within the Houston I.S.D. The State Board of Education denied relief, and its order was affirmed by the District Court of Travis County, 126th Judicial District of Texas, which granted summary judgment. Additional defendants in the state court action were the Texas Education Agency and the State of Texas. Subsequent to this court's entry of the preliminary injunction in the instant case, the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas affirmed the judgment of the district court and upheld the constitutionality of section 21.031. Hernandez v. Houston Independent School District, supra. The Supreme Court of Texas refused an application for the writ of error, with the notation, "No reversible error." Defendants have not argued that the Hernandez decision is in any way binding on this court in the case before the court.

Findings of Fact

The minor plaintiffs herein are all school-aged children, born in the Republic of Mexico, who reside with their parents within the boundaries of the Tyler I.S.D. None of the minor plaintiffs possesses documentation that he or she is legally in the United States or is in the process of securing such documentation. There are probably thirty to forty undocumented school-aged children residing in the Tyler I.S.D. in addition to the named plaintiffs.

Each minor plaintiff is represented in this civil action by his or her parents, as next friends. All of the parents in question are aliens of Mexican origin, who illegally entered and remained in the United States, and who reside within the boundaries of the Tyler I.S.D. The families represented in this civil action have lived in the city of Tyler for a period of three to thirteen years. Each such family includes at least one child, not of school age, who is a citizen of the United States by virtue of his or her birth in the United States.

The Tyler I.S.D. constitutes a public school district, which receives some federal funding in addition to state and local funds. James Plyler is the Superintendent of the Tyler I.S.D. The managing board of the District is the Board of Trustees.

Section 21.031 of the Texas Education Code (Vernon Supp. 1976), effective September 1, 1975, limits the benefit of the state's "Available School Fund" to children between the ages of five and twenty-one, who are citizens of the United States or legally admitted aliens; it limits admission to the public free schools in any district to such citizens or lawfully resident children whose parents or guardians reside within the district. (Section 21.031 is set forth in the procedural history of this case, supra at 1.)

On July 21,1977, acting in furtherance of and pursuant to section 21.031, the Tyler I.S.D. Board of Trustees promulgated a policy concerning the financing and control of education for illegally admitted aliens. This policy, set forth in full, supra at 2, permits the enrollment of illegal alien children only upon payment of tuition. The policy defines illegal alien children as those who neither possess documentation that they are legally within the United States nor are in the process of successfully securing such documentation.[5/]

The Tyler policy has been implemented by defendants and their agents since the beginning of the 1977 school year. In accordance with that policy and based upon an educational expense analysis conducted by the Administrative Office of the Tyler I.S.D., an amount of tuition of $1,000.00 per year has been set as a fee for each child residing within the Tyler I.S.D. who is neither a citizen of the United States, a legally admitted alien, nor an illegal alien who has begun processing his papers for legal admission with the United States Immigration Service. The sum of $1,000.00, representing the approximate proportional cost of educating a single child in the Tyler I.S.D., was arrived at by dividing the district's annual operating budget, $18.5 million, by the approximate number of enrolled students, 16,000.

All of the parents of the plaintiffs were informed by school officials that their children could not attend the school without either producing the required documents or paying the $1,000 tutition fee. There is no reasonable expectation that any of the named plaintiffs or their parents can obtain the required documents from the United States Immigration and Naturalization Service.[6]

Except for the existance of section 21.031 and the Tyler I.S.D. policy, all named plaintiffs would be eligible for admission to the Tyler I.S.D. on a tuition-free basis and would currently be enrolled in the Tyler public schools. All minor plaintiffs, with the exception of two, attended the Tyler I.S.D. schools in the school year 1976-1977. The two excepted children attended the Tyler I.S.D. Head Start Program in the summer of 1977, preparatory to entering the first grade. Because of their poverty, none of the parents of the named plaintiffs can afford to pay the tuition fee of $1,000 or any other significant sum. None of the minor plaintiffs possesses independent resources to pay such tuition. Prior to the issuance of the preliminary injunction in this civil action, none of the named plaintiffs was attending school in the Tyler I.S.D., except for J.D. Doe. Two undocumented children are currently attending the Tyler public schools as tuition-paying students.

Were the preliminary injunction issued by this court not in effect, none of the named plaintiffs, with the exception of those children identified as Doe, would currently be attending any school. The Doe children, except for J.D. Doe, were enrolled in a Catholic school after being rejected for admission to the Tyler I.S.D. on a tuition-free basis. Doe works for the Catholic school in Tyler on weekends, in exchange for his children's attendance.

The parents of plaintiffs Doe are owners of real and personal property in the Tyler I.S.D. All other parents of minor plaintiffs rent housing within the Tyler I.S.D. At least one parent of those children identified as Doe,Roe, and Loe is employed, and federal income and Social Security taxes are withheld from his or her paycheck. Three of the four families represented had purchased at least one automobile and could produce registration and title documentation.

The primary purpose of section 21.031, as characterized by the State of Texas, is to employ public educational funds to provide education to U. S. citizens and legally admitted aliens.[7/] The Tyler I.S.D. policy was implemented pursuant to the state statute, in order to prevent the potential drain on local educational funds should Tyler become a haven for illegal aliens. The court finds, however, that neither the statute nor the policy has either the purpose or effect of keeping illegal aliens out of the State of Texas.

Increasing numbers of Mexican nationals have emigrated into the United States in recent years. A large portion of these immigrants have settled in Texas, resulting in significant increases in public school enrollment. For example, Defendants' Exhibits 2 and 3 show that the number of Mexican alien students enrolled rose from 44,799 in 1975-76 to 51,348 in 1976-77, increasing the statewide percentage of Mexican alien children in the public schools from 1.59 to 1.8 percent. The great majority of such children are assumed to be legal residents. Tr. 1/16 at 184. This wave of migration has presented grave problems for the public schools in Texas. The mere increase in population, without regard to any special characteristics of Mexican immigrant children as a class, has meant that existing school facilities in the impacted areas are physically inadequate. The failure of some school districts to build new facilities or augment existing ones has necessarily resulted in overcrowding of school buildings and classrooms.

The State of Texas is deeply concerned with the growing impact of Mexican migration on its public schools. Defendants' Exhibit 6, the Mexican Immigrant-Alien Student Study, 1975-76, chronicles the development of this concern, which prompted a resolution of the State Board of Education in July, 1975, recognizing the need for further study of the problem. Subsequently, an in-depth investigation of the problem in the districts bordering the Republic of Mexico was conducted by the Region One Education Service Center, in Edinburg, Texas. The Texas Education Agency effected a survey of the problem in the remainder of the state. These studies, introduced into evidence by the state, reveal that overcrowding has reached serious, indeed "atrocious", proportions in the border areas and in metroplitan districts. The Region One Study identifies further characteristics, peculiar to Mexican immigrants, exacerbating the problem: the children generally speak little or no English and are badly educated and overage for their grade level. Special bilingual education for these children is indispensable, yet it is difficult to find qualified personnel for such programs, which also require a disproportionate amount of teacher attention. Additionally, these children tend to come from poor families. Their residence in a school district thus does little to offset the additional cost by adding to the tax base.

The state's witnesses, Thomas Anderson (a representative of the Texas Education Agency), John Eaton (Associate Superintendent of Houston I.S.D.), and Jim Bob Hensley (author of Defendant's Exhibit 6), expressed the opinion that the major justification for section 21.031 was its partial solution to the educational difficulties caused by migration from Mexico in general. No convincing testimony was presented, however, that singled out undocumented children as particularly problematic.[8/] The characteristics of legally admitted, Mexican-born children, as a class, are very similar, if not identical, to those of undocumented Mexican-born children. Typical of the undifferentiated analysis of the problem is the testimony of Jim Bob Hensley that a "national policy had permitted a flow of immigrants into the country, and a local school district was being penalized for that," Tr. 12/12 at 302, and of John Eaton that "it would impact, if we had more Hispanic children coming in. . ." Tr. 12/12 at 259.

The evidence discloses that the exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level; but the savings are unpredictable both in amount and distribution. Approximately twenty-five percent of educational expenditures in Texas are in fixed cost areas, i.e., administrative, maintenance, and operation costs, which are not diminished by moderate declines in student enrollment. The largest item in variable costs is teacher salaries, which require substantial and concentrated decline in enrollment before any economies result. Generally, a decrease of twenty to thirty students at one time, in a given grade and in a given school, is required in order to justify the dismissal of one teacher. Even then, systems of tenure and seniority operate to minimize savings, since the first teachers to be dismissed are ordinarily those with the lowest salaries. Hence, the proportional cost (operating budget divided by enrollment) is a very inaccurate indicator of the incremental expense of educating additional students.

The connection between the "economy measure" of excluding undocumented children from the benefits of the Available School Fund and increasing educational quality for the remaining students was shown to be unreliable, and often perverse in operation. Educational funds in Texas come from state, local and federal sources. A local district's allotment from state funds depends, in part, on its average daily attendance ("ADA"). Prior to the enactment of section 21.031 in 1975, a district could include undocumented children in its ADA and receive state funds accordingly. Under section 21.031, however, a district is required to exclude undocumented children from its ADA, decreasing the amount of state funds it receives. Meanwhile, the diminished enrollment, by reason of the factors described above, is unlikely to have resulted in any savings to the local district. The school district is then forced to choose between increasing its own contribution, so as to maintain the current level of expenditures, or cutting back on its programs. Although the state will have saved money, it will not necessarily have improved the quality of education.

The federal government funds the free breakfast, lunch, and clothing programs for which many children of Mexican origin are eligible, whether or not they are legal residents. The largest single source of funds for bilingual education is the federal government, which pays for approximately forty-five percent of the cost. Approximately eighty percent of the remainder is paid from local funds; twenty percent is paid by the state.

In the Tyler I.S.D., the impact of the undocumented children on the school system (at most sixty out of an enrollment of 16, 000 in 1977) has been negligible, as were the savings to the district after exclusion of the children. Dr. James Plyler, Superintendent of Tyler I.S.D., testified that the admission of undocumented children would raise the number of children of limited English-speaking ability to twenty-two kindergarten students and twenty first-grade students, triggering the implementation of a formal bilingual education program under state law. The district is already, from its own sense of educational priorities, employing three bilingual teachers. Implementation of the statutory program would require additional teachers and compliance with certain administrative procedures.

In 1976 the Immigration and Naturalization Service ("I.N.S.") estimated that approximately four to five thousand undocumented children resided in the Houston I.S.D.,[9] which had a total enrollment of 206,998 students. The total proportional cost of educating a needy Mexican child, whether a legal or an illegal resident, was $1,740.41 (including free lunch, free breakfast, free clothing, and bilingual education, in addition to the regular curriculum); this is $400 to $500 more than the proportional cost of educating what Associate Superintendent Eaton designated as the "average pupil".

The predictable effects of depriving an undocumented child of an education are clear and undisputed. Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, these children, without an education, will become permanently locked into the lowest socio-economic class. Furthermore, witnesses from both sides testified that the illegal alien of today may well be the legal alien of tomorrow. According to Dr. Gilbert Cardenas, plaintiffs' expert on migration, the majority (fifty to sixty percent) of current legal alien workers were formerly illegal aliens. Roland Heston, District Director of the Houston District of I.N.S., a witness for the state, confirmed that undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident. The court also takes judicial notice of various presidential and legislative proposals that would legalize the status of many currently undocumented children. See, e.g., Office of the White House Press Secretary, President's Message to the Congress on Undocumented Aliens at 5 (Aug. 4, 1977).

Generalizations About Illegal Aliens

Testimony and exhibits received into evidence during the trial of this case attempted to describe the alien population illegally in Texas. There is little dispute about most such generalizations, but they are made in the face of what the Domestic Council's Preliminary Report calls a "dramatic lack of reliable information" (Preliminary Report at 235); thus this court does not desire to vest them with the certainty and authority ordinarily associated with findings of fact. However, the following tentative conclusions revealed by various studies have been of interest to the court in its consideration of the case.

Estimates of the number of illegal Mexican aliens in the United States vary widely and are inherently unreliable by reason of the clandestine nature of the illegal population. Marion Houstoun, one of plaintiffs' migration experts and co-author of the North-Houstoun Study,[10/] estimated that there are 2.7 million Mexicans illegally in the United States and 675,000 in Texas. This was thought to be a conservative estimate by other witnesses questioned about the matter. The I.N.S. no longer makes estimates.

The impetus for illegal migration is predominantly economic, and consequently its principal impact in the United States is on the labor market. The vast majority of illegal Mexican immigrants are young adult males (averaging around thirty years old) seeking employment opportunities in this country.[11/] Indeed, the great majority of the illegal alien class is not of concern in this case, since these workers are either single or leave their families in Mexico and come to the United States for short periods of time. Much of the earnings of these illegal immigrants is sent to their dependents in Mexico. This case mainly concerns a very small sub-class of illegal aliens with very different characteristics, that is, entire families who have migrated illegally and--for all practical purposes--permanently to the United States.

A few available studies tend to refute--although not conclusively--allegations that illegal aliens, as a class, produce a substantial drain on public services. Two reasons are advanced for this phenomenon: (1) they are unwilling to risk exposure and hence shy away from any institutional involvement; and (2) there is no welfare tradition in Mexico to which they may have become accustomed. Conclusions about the tax contributions of illegal aliens in general are necessarily more intuitive than scientific. There is no state income tax in Texas, but it is impossible to live in a state such as Texas without paying consumer taxes, and nearly impossible to work without paying Social Security taxes. Normally, families with many children do not pay large amounts of federal income tax, regardless of the legality of their residence in the country. However, Social Security taxes are the major source of tax revenues the federal government collects from the poor in general. Preliminary Report at 162.

Conclusions of Law

Plaintiffs urge that section 21.031, implemented by the Tyler I.S.D.'s policy of charging undocumented children a tuition fee, denies them their right to equal protection of the laws, as guaranteed by the fourteenth amendment. Plaintiffs also argue that the challenged statute and policy should be subjected to close judicial scrutiny because: (1) plaintiffs are being absolutely deprived of any education; and (2) they are a politically powerless minority, forced to suffer because of the misdeeds of parents over whom they have no control. The fiscal justifications advanced by the Tyler I.S.D. in support of their policy, plaintiffs contend, are insufficiently compelling to justify the discrimination imposed.

Defendants counter with the argument that illegal aliens are not entitled to equal protection of the laws, but that even if they were, the challenged statute and policy are merely "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," thereby requiring only relaxed judicial scrutiny. Dandridge v. Williams, 397 U.S. 471, 484 (1970). Defendants also maintain that their decision to spend public funds to provide high quality education for United States citizens and lawful residents, instead of sharing it with people who have no right to be in the state at all, should be subjected to, and easily satisfies the long-established rational basis test. See, e.g., Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

Neither the language nor the logic of the fourteenth amendment supports the proposition that the guarantee of equal protection of the laws does not extend to illegal aliens. The United States Supreme Court has indicated that illegal aliens are entitled to the protection of the due process clause.

See, e.g., Mathews v. Diaz, 426 U.S. 67, 77 (1976) (dictum); Wong Wing v. United States, 163 U.S. 228 (1896). The structure of section one of the fourteenth amendment does not indicate a different result for the guarantee of equal protection of the laws:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

While due process is afforded to "any person," equal protection extends only to "any person within its jurisdiction." Yet this apparent narrowing of the equal protection guarantee, by virtue of its very specificity, should not be read to exclude a class of persons that fits within the narrowed language. People who have entered the United States, by whatever means, are "within its jurisdiction" in that they are within the territory of the United States and subject to its laws. Joining Judge Friendly in Bolanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975), this court "can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States [citations omitted] and even to aliens whose presence here is illegal." Accord, Holley v. Lavine, 529 F.2d 1294 (2d Cir.), cert. denied, 426 U.S. 954 (1976); United States v. Barbera, 514 F.2d 924 926 n. 3 (2d Cir. 1975). Cf. Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) (illegal aliens entitled to access to divorce courts); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936) (illegal alien allowed to sue to recover for personal injuries in negligence action); Commercial Standard Fire and Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.--El Paso 1972, writ. ref'd n.r.e.) (illegal alien not barred from workmen's compensation benefits). But see

Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).[12]

The conclusion that illegal aliens are entitled to equal protection of the laws in no way means, however, that illegal aliens are entitled to precisely the same treatment afforded U. S. citizens and lawfully resident aliens. As Mr. Justice Jackson described the "salutary doctrine" of the equal protection clause, "cities, states and Federal Government must exercise their powers so as not to discriminate between their inhabitants, except upon some reasonable differentiation fairly related to the object of regulation." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (concurring opinion). Viewed in this light, as a guarantee only that *unreasonable*, *arbitrary* lines will not be drawn, the content of the right to equal protection of the laws, not its application *vel non*, becomes the salient question, and one that must be assessed with respect to each individual case.

The fairness of the legislative classification contained in the challenged statute and policy must be measured within the framework of the well established two-tiered test. If the challenged law threatens a fundamental right or creates a suspect classification, the court must subject the state's interests served by the law to strict scrutiny. In such a case, the law will be upheld only if it is precisely tailored to further a compelling government interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). Absent a fundamental right or suspect classification, a law need only be supported by a rational basis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973).[13]

As implemented by the Tyler I.S.D., section 21.031 has created a distinct class of poor, undocumented children who are absolutely deprived of any education whatsoever. While the level of scrutiny appropriate for reviewing this kind of total deprivation of education has never been explicitly identified by the Supreme Court, several elements in this case invite a close examination of section 21.031.

The first of these elements lies in the benefit denied, education. In San Antonio Independent School District v. Rodriguez the Court said that "[e]ducation, of course, is not among the rights afforded explicit protection under out Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35. Yet the holding of Rodriguez was explicitly and repeatedly limited to the sort of relative deprivation of education challenged in the case itself. Under the Texas school financing scheme, children in property-poor school districts attended schools with access to fewer funds than those in property-rich school districts; but no children were prevented from attending school altogether. Indeed, the opinion is conspicuous in its efforts not to foreclose strict scrutiny in response to constitutional challenges to absolute deprivation of educational opportunity:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people--definable in terms of their inability to pay the prescribed sum--who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

411 U.S. at 25 n. 60.

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 37.[14/] See also Mills v. Board of Education, 348 F. Supp. 866, 876 (D.D.C. 1972).

An additional indication that heightened scrutiny may be appropriate arises from the contention that the challenged policy of charging tuition to undocumented children constitutes discrimination on the basis of wealth.[15/] Relatively wealthy undocumented children are able to attend school despite the Tyler I.S.D. policy--two such children are actually doing so--, while poor undocumented children are excluded. In Rodriguez, the Court distinguished prior cases in which the class discriminated against "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20. Such absolute deprivations imposed only on poor people have long been considered deserving of judicial solicitude, see, e.g., Griffin v. Illinois, 351 U.S. 12 (1958), and such a tuition requirement was explicitly distinguished in Rodriguez when the Court declared that the existence of "a clearly defined class of 'poor' people" would "present a far more compelling set of circumstances for judicial assistance" than the San Antonio case itself. 411 U.S. at 24 n. 60. Similarly, in Shapiro v. Thompson, 394 U.S. at 633, the Court observed that a state "could not, for example, reduce expenditures for education by barring indigent children from its schools."

Furthermore, although it is not inaccurate to characterize section 21.031 as "state regulation in the social and economic field," Dandridge v. Williams, 397 U.S. at 484, as defendants urge, this case does not follow the pattern of those in which such a characterization has triggered relaxed rather than heightened review. In Dandridge, as in Rodriguez, the deprivation was relative rather than absolute, i.e., some families received less aid in proportion to the number of children than others, but no discrete class of needy families was completely cut off from benefits. See also Jefferson v. Hackney, 406 U.S. 535 (1972).

A more exacting scrutiny of the Texas law also appears warranted when consideration is given to the decisions of the Supreme Court refusing to penalize and stigmatize children who are not in a position to prevent the wrongful acts of their parents. As Mr. Justice Powell said of laws disfavoring illegitimate children:

> [V]isiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.

Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175 (1972) (footnote omitted). See also St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974) (invalidating school board's decision to suspend two children from school because their mother had assaulted an assistant principal, on ground that "[f]reedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice."). While the undocumented minor plaintiffs are of course legally culpable and subject to deportation,[16/] they can hardly be held morally responsible for their presence here. Many of them were hardly more than infants when they arrived in the United States, nor did they participate in their parents' decision to emigrate; consequently they deserve no additional burdens or penalties.

Finally, plaintiffs, together with the United States as amicus curiae, urge that strict scrutiny should be applied because illegal aliens are basically a suspect class. Illegal aliens as a class, they urge, meet all the "traditional indicia of suspectness," in that,

> [t]he class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

411 U.S. at 28.

Plaintiffs and amicus further maintain that illegal aliens are a suspect class because they are a sub-class of a suspect class, that is, of aliens in general. Nyquist v. Mauclet, 432 U.S. 1 (1977). However, it is clear that illegal aliens are not a sub-class of the class of aliens granted suspect status in Graham v. Richardson, 403 U.S. 365 (1971), and its progeny, for the Supreme Court in Graham referred specifically to the class of lawfully admitted aliens. Illegal aliens are, therefore, not a sub-class but rather a separate class, for which suspect status must be independently established.

The State of Texas makes the provocative argument that it is the implicit holding of DeCanas v. Bica, 424 U.S. 351 (1976), that illegal aliens are not a suspect class. At issue in DeCanas was a California statute (Cal. Lab. Code §2805(a)) prohibiting the knowing employment of illegal aliens when lawfully resident workers would be disadvantaged.[17/] The Supreme Court held that the law was not unconstitutional as a regulation of immigration, see infra at 36. The State of Texas contends that the California law disfavors illegal aliens and would necessarily have fallen under an equal protection analysis if illegal aliens had been regarded as a suspect class.

While the DeCanas opinion makes no mention of the equal protection clause, the case was, in the abstract at least, susceptible to equal protection analysis. It does not appear, however, that any of the parties in DeCanas had standing to raise the equal protection question. Employers of illegal aliens were defendants in a suit brought by displaced legal alien workers to enforce the California law; it was the defendant employers who raised the federal preemption argument as a defense. Nevertheless, even if DeCanas had been upheld squarely against an equal protection challenge, this court feels that the case is substantially distinguishable on both the general question of the constitutionality of section 21.031 and the particular question of whether illegal aliens are a suspect class, see infra.

It seems clear that illegal aliens do not constitute a suspect class when they are in violation of state laws or regulations whose underlying purpose is in conformity with a federal objective or end. It is equally apparent, however, that in certain conditions and circumstances unrelated to the federal bases for their exclusion, illegal aliens, as a class, are susceptible to and have suffered much abuse and exploitation. A reconciliation of this conflict might be accomplished by recognizing illegal aliens as a suspect class--and requiring strict scrutiny--in cases where the state acts completely independently of the federal exclusionary purposes and, indeed, accepts the presence of illegal aliens, but then subjects them to gratuitously abusive laws that render them an underclass. The law in DeCanas and section 21.031 clearly part company under this analysis, as an inquiry into the effect and purposes of federal law reveals.

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The cornerstone of federal immigration law remains the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act, 8 U.S.C. §§1101 et seq. Insofar as the instant case is concerned, the most salient features of the Act are: limitation of immigration into the United States; exclusion of those aliens who are not granted visas; and assignment of criminality to foreigners who enter without permission. The McCarran-Walter Act identifies two main principles according to which the admission of prospective immigrants must be defined. First, the Act evidences a strong concern for family reunification, making a relationship with a United States citizen or permanent resident the primary means of obtaining a visa. Second, the Act contains a labor certification program "designed to protect the United States labor market from the influx of both skilled and unskilled foreign labor." Note, Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion, 43 Geo. Wash. L. Rev. 914 (1975).

Section 212(a)(14) of the McCarran-Walter Act originally placed the burden of certification on the Secretary of Labor. Aliens were not ineligible for admission until the Secretary so certified.[18] In 1965, partly in response to requests from organized labor, see Note, 43 Geo. Wash. L. Rev. at 915 n. 9, Congress amended the provision to strengthen its protection of the domestic labor force. As amended, the labor certification program excludes an alien worker[19] unless the Secretary of Labor makes certain determinations. Specifically, the section provides:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which

> the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title. . .

8 U.S.C. §1182(a)(14) (1970).

Since illegal aliens come to the United States to find employment, it is reasonable to assume that they would not emigrate if they did not expect to find employment. The prohibition of employment of illegal aliens is an important feature of major federal proposals to upgrade the effectiveness of congressional limits on immigration, indicating a consensus of opinion that such measures are effective. See also Preliminary Report at 241. The Supreme Court has repeatedly recognized the same phenomenon: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in the ordinary cases they cannot live where they cannot work." Takahashi v. Fish & Game Commission, 334 U.S. 410, 416 (1948), quoting Truax v. Raich, 239 U.S. 33, 42 (1915).

A state law prohibiting employment of illegal aliens may be entirely consistent with the federal scheme. The improved federal labor certification program was enacted, in the words of its proponents, to "protect . . . the American economy and the wages and working conditions of American labor." 111 Cong. Rec. 24463 (1965) quoted in Note, Alien Labor Certification, 60 Minn. L. Rev. 1034, 1034 n. 3 (1975). The California legislature's prohibition of the knowing employment of illegal aliens manifestly represents a local effort to deal with a particularly aggravated version of the dangers Congress has recognized and made one of its central concerns. Thus, although the DeCanas Court did not base its decision on this point, the state scheme, perhaps unwittingly, serves the basic purposes of the Immigration and Nationality Act, for section 2805(a) promotes not only the specific federal design of protecting the domestic labor market, but also the general function of exclusion.

By contrast, the Texas statute at issue in the instant case is neither intended to, nor does it in fact, implement any express or apparent federal objective. The State does not attempt to justify section 21.031 as an effort to exclude or to discourage those aliens whom Congress has chosen to exclude, nor could such a justification be taken seriously. Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration, when compared with the California statute[20/] or the proposed federal equivalents. While the Texas legislature is in no way obligated to prohibit the employment of illegal aliens, its failure to do so is glaring and undermines any earnest attempt to argue an exclusionary motivation.[21/]

In short, by its own admissions and the logic of its legislative scheme, the State of Texas has been content to leave to the federal government the task of excluding illegal immigrants and thus protecting the domestic labor market.[22/] This virtually ensures what is undisputably the case in Texas: the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them. In such a context, the state's exclusion of undocumented children from its public schools, or, alternatively, its attempts to exact from such children a much larger sum of money than is in fact required to absorb them into an ongoing school system, may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed. In the instant civil action, however, none of four indications that strict scrutiny is the appropriate level of review, as discussed above, exactly corresponds with any case in which the Supreme Court has applied such scrutiny. In any case, since it appears that defendants have not demonstrated a rational basis for the state law or the local school policy, it is not necessary to resolve finally the difficult conceptual problems posed by the two-tiered test.

Defendants seek to justify section 21.031 by arguing that, in view of the limited revenues available within the state which can be used to achieve the social goal of educating Texas children, "[t]he legislature has determined that those funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas." Brief of Defendant Tyler I.S.D. at 16.[23/] Defendants attempt by their proof at trial to rationalize this decision by cataloguing a number of characteristics and special educational needs that make illegal alien children especially burdensome to educate. Notwithstanding, careful consideration of the evidence and applicable law compels the conclusion that neither of these approaches provides a rational basis for the state's singling out of undocumented children to bear the brunt of whatever financial problems the Texas public schools may have.

It is not sufficient justification that a law saves money. This approach to the rationality test is well illustrated in the case of United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), in which the Supreme Court struck down as irrational section 3(e) of the Food Stamp Act of 1964, which excluded from participation in the food stamp program any household containing an individual unrelated to any other member of the household. Clearly this exclusion would have saved the federal government money; a program affording benefits to all households costs more than a program affording benefits only to some. Despite this factor, the saving to the Government was not considered by the Court as a sufficient justification, absent some rational connection between the purposes of the Act and the group excluded. Emphasising the purpose of the Food Stamp Act--the stimulation of the agricultural economy by the purchasing of farm surpluses--, the Court held that the relationships among persons in a household were irrelevant to that purpose and did not provide a rational principle of exclusion. The legislative history of section 3(e) revealed that the provision "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." 413 U.S. at 534. Apparently, Congress chose not to subsidize living arrangements and lifestyles of a certain variety. But, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm[24/] a politically unpopular group cannot constitute a legitimate governmental interest." Id.[25/]

The state's first line of defense for its distinction between legal and illegal residents can be restated, both in substance and tone, as "it goes without saying." In its own words, "the legislature has determined that [educational] funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas." Brief of Defendant Tyler I.S.D. at 16. This,however, does not demonstrate a rational basis; it is merely a reaffirmation of the law itself. The Supreme Court recently rejected a similarly "rational" basis as a mere "assertion that discrimination may be justified by a desire to discriminate". *Examining Board v. Oteró*, 426 U.S. 572, 605 (1976).

Nor does the state's adoption of a federal criterion, in this case the illegality of a child's presence in the United States, in itself, provide a rational justification for differential treatment by the state. Mr. Justice Murphy explained this fallacy in his concurring opinion in *Oyama v. California*, 332 U.S. 633 (1948). Assuming that Congress had made a reasonable classification in exercise of its authority to regulate immigration,

> [y]et it does not follow . . . that California can blindly adopt those distinctions for the purpose of determining who may own and enjoy agricultural land. *What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose*. . . .. In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. *Is the distinction a reasonable one for the purposes for which the state desires to use it?* To that question it is no answer that the distinction was taken from a federal statute. . ..

332 U.S. at 664-65 (emphasis added).

Because of the crucial distinction between federal and state power in the immigration area, defendants' reliance on *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), to justify their use of plaintiffs' illegal immigration status as a principle of exclusion, is wholly misplaced. In *Mathews*, the Court upheld a congressional decision to condition an alien's eligibility for federal medical insurance upon continuous residence in the United States and admission for permanent residence. In so holding, the Court noted that "[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." 426 U.S. at 80. The opinion makes clear, however, that while distinctions in immigration status are legitimate bases for federal classifications, they are normally of no concern to the states.

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.

Id. at 85 (footnote omitted). Subsequently, the Court reaffirmed the inappropriateness of state importation of immigration criteria, by holding that the State of New York "can draw no solace from [*Mathews v. Diaz*, *supra*], however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n. 8 (1977).

The question for determination in this case is, therefore, the one posed by Mr. Justice Murphy in *Oyama*: Is the federal distinction a reasonable one for the purposes for which the state desires to use it? Two main categories of state interests in discriminating against illegal aliens might satisfy this requirement. The first category is state interests which are concurrent with the federal interests for which the distinction was originally drawn. The second category includes state attempts to deal with problems generated by an alien's illegal status, rather than merely with his presence. The California law upheld in DeCanas falls within and illustrates both categories, while the Texas statute challenged here belongs to neither.

The rationality of California's section 2805(a) is clearly revealed by the Supreme Court's statement that "the State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes." Gilbert v. Minnesota, 254 U.S. 325 (1920). Had section 2805(a) been subjected to an equal protection challenge, it might easily have been upheld as a means of preventing California citizens from encouraging illegal immigration, i.e., obstructing federal law by employing illegal entrants,[26/] or as a local measure dealing with congressionally-recognized problems of local labor.

In the second category of rational state interests mentioned above, the class of illegal workers disfavored by section 2805(a) is clearly distinguishable from the class of lawful resident workers, by virtue of their very illegality. The Supreme Court in DeCanas recognized that infiltration of illegal aliens into a labor market has marked effects on that market: "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." 424 U.S. at 356-57. The threat to labor standards posed by employment of illegal aliens is universally acknowledged. See sources cited supra at n. 10. Illegal immigrants, by virtue of their covert status and fear of exposure, cannot invoke state and federal laws enacted to improve conditions of employment. The nexus between violation of the immigration laws and the resultant adverse effects on a local economy is clear and well documented. Illegal aliens "live under the constant fear of detection and deportation, and are thus easily exploited by employers looking for persons to work at low wages and under poor conditions." Miller, Immigration and National Law, 1977 Annual Survey of American Law 205, 228.

In summary, California's decision to require that employers give preference to lawful residents over illegal entrants is rational for two reasons. First, it borrows the federal criterion in order to deal with the same problems, on a local level, for which, on a national scale, the federal law was enacted. Second, the distinction drawn in section 2805(a) is rational, because characteristics peculiar to illegal workers are central to the threat to labor standards which the law addresses. In contrast, Texas' section 21.031 does not purport to serve any federal purposes. Neither has the state articulated the discrete considerations relating to the status of the class excluded by section 21.031 that make it reasonable for the state to refuse to educate its members. On the contrary, all of the arguments advanced by the state to justify its decision to exclude illegal aliens, as opposed to any other group, are either underinclusive or overinclusive, so as to belie any truly rational connection between the ends sought and the means employed.

The state has not explicitly argued that illegal aliens are distinguishable because they pay lower or no taxes, nor would such an argument have merit. While not conclusive, the preponderance of the evidence indicates that illegal aliens do pay taxes. The major source of the state's educational expenditures is consumer taxes, which no resident of the state, whatever his citizenship or immigration status, can avoid paying. The evidence was to the effect that anyone who rents housing indirectly contributes to the property tax, which accounts for most local educational contributions. Thus, illegal aliens contribute to these public funds on an equal basis with all other residents of the United States. This does not mean, of course, that all residents pay identical amounts of taxes; rather, that illegal aliens are subject to the same taxes as other residents of similar means. As has been mentioned earlier in this opinion, poor families in general pay little income tax. In the context of this case, this is of negligible significance, however; the State of Texas has no income tax, and the federal government collects its major contribution from the poor by way of Social Security taxes, which illegal workers cannot easily avoid paying. Preliminary Report at 162. It has never been suggested that, simply because his parents are poor and pay comparatively small amounts in taxes, the state is permitted to limit a resident child's access to public education. *See* *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (a state "could not, for example, reduce expenditures for education by barring indigent children from its schools."). As the Supreme Court has recognized in analogous situations,"the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes. . .' [citations omitted]. There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the state." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

As the findings of fact show,[27] in this case the bulk of defendants' evidence was directed at proving what none tried to dispute, that Mexican emigration into the United States has caused grave overcrowding in the border school districts, which has been compounded by the poverty of the parents of the Mexican children and their special needs (bilingual education, free lunch, free breakfast, and free clothing). Excluding illegal immigrant children because of these problems is both irrational, because the undocumented children as a class are basically indistinguishable from the legally resident alien children in terms of their needs,[28/] and ineffectual, because the dominant problem remains unsolved. Viewed in light of the state's own statement of the issue with which section 21.031 attempts to deal, the irrationality of its choice of means is clearly revealed. An influx of poor, Spanish-speaking children, especially in the school districts adjacent to Mexico, has occasioned the hardships complained of by defendants. Most of these children are legally present in the United States. If exclusion of certain resident children from the school system is chosen as the method of dealing with inadequate educational facilities, the rational approach is to exclude all such problem children regardless of whether they are legal or illegal residents. It would be easy to define the precise limits of such a group, using the various "problem criteria" such as parental wealth, English-speaking ability, age relative to assigned grade, degree of educability, and the other characteristics the state has urged in this lawsuit as a justification for exclusion. A category of all non-English speaking children whose parents own property valued at less than a given amount would probably take care of the situation nicely, in that it would effectively exclude Mexican immigrants.

The obvious unconstitutionality of such a statutory classification presents an insurmountable obstacle to its enactment into law. Nevertheless, bent on cutting educational costs and unable constitutionally to exclude all such "problem" children, the state has attempted to shave off a little around the edges, barring the undocumented alien children despite the fact that they are no different for educational purposes from a large proportion of legally resident alien children. The expediency of the state's policy may have been influenced by two actualities: children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf.

Apart from the arbitrary nature of the state policy, such a marginal approach to a major social problem is strikingly ineffectual. This court notes with irony that any spectator watching the state's presentation of evidence might easily have mistaken it for a retrial of the *Rodriguez* case, with the State of Texas acting as *amicus curiae* for plaintiffs, emphasizing the plight of the property-poor border school districts under the state's educational financing scheme. While upholding the state's scheme of financing public education as constitutional in *Rodriguez*, the Supreme Court never expressed the view that it was perfect, or even wise. Rather, the Court went only so far as to recognize that the system "was implemented in an effort to *extend* public education and to improve its quality," 411 U.S. at 39, and that it "assur[ed] a basic education for every child in the State," *id*. at 49. Consequently, the state's policy was not subjected to close judicial scrutiny.

Texas' present method of financing public education by relying heavily upon the property wealth within a school district has apparently begun to strain at the seams. The state, as well as the children attending threadbare schools, now finds the contemporary policy insupportable. This court expresses no opinion as to how the State of Texas might readjust its public school financing scheme in order to respond to the stark inequalities of educational opportunity between children in the border and metropolitan school districts and children in districts such as the Tyler I.S.D., where the impact of immigration is admittedly negligible. The court can, however, invalidate state efforts that fail to demonstrate a rational basis and that make scapegoats of a defenseless group, chosen in an arbitrary, or even invidious manner.

Finally, it is necessary to address the question of whether the statute and policy challenged here have infringed upon an area that is preempted by federal law. In DeCanas v. Bica, supra, the Supreme Court considered the preemption argument on three levels. First, the Court declared that although the federal government's exclusive power in the area of immigration is well established, not every state enactment dealing with aliens is preempted as a regulation of immigration. 424 U.S. at 355. Characterizing section 2805(a) of the California Labor Code[29/] as an essentially local effort on the part of the state to "strengthen its economy," the DeCanas Court held that the Constitution did not require preemption of such state regulation as "an invalid state incursion on federal power." 424 U.S. at 355-56.

Next, the DeCanas Court considered whether Congress, in enacting the Immigration and Nationality Act, had clearly intended a complete ouster of state regulatory power over the employment of illegal aliens. Such a "manifestation of congressional intent to 'occupy the field,'" id. at 357 n. 5, or "to preclude even harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular," id. at 356, would have required invalidation of the state law under the supremacy clause. The Court found that preemption was not compelled on this basis.

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The final inquiry in DeCanas focused on whether the California statute burdened or conflicted with any federal laws or treaties. Again, in such a case, the supremacy clause requires preemption "to the extent necessary to protect the achievement of the aims of" the federal legislation, id. at 358 n. 5, quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973). DeCanas was remanded for a determination of whether the statute presented any "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 424 U.S. at 363, quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The DeCanas Court apparently found that the California labor statute mirrored the federal government's concern with protection of the domestic labor market. See 424 U.S. at 363. Depending upon how it is construed by the state courts, the statute may withstand the preemption challenge. In sharp contrast, the Texas statute at issue in the instant case is inconsistent with the federal scheme and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 312 U.S. at 67, as expressed not only in the Immigration and Nationality Act but also in federal laws relating to funding and discrimination in education. Thus, under the third preemption principle enunciated in DeCanas, section 21.031 must fall.

The questions of section 21.031's consistency with congressional intent and of its validity under the equal protection clause are intimately related. Congressional sensitivity to the constitutional rights of those it regulates is traditionally assumed by courts in assessing congressional intent. Id. at 74; Kent V. Dulles, 357 U.S. 116, 129 (1958). As already set out, the subcategory of illegal aliens affected by section 21.031 consists of more or less settled families, who have established deeper roots in this country than the much more typical single temporary illegal worker. The plaintiff families in this suit, for example, have lived in Tyler for years and are likely to remain unless deported. The state has accepted their taxes and its citizens have profited by, perhaps even exploited, their labor. Regardless of the doctrinal language chosen, the fundamental issue is what burdens the state may impose on established residents who are in violation of federal immigration laws.

In its exclusive authority to regulate immigration, Congress has chosen to limit the number of aliens who may emigrate into the United States each year. The preference system now in effect reveals two primary principles of selection: family unification and protection of the domestic labor market. The testimony and exhibits in this case reveal that federal enforcement efforts follow two major patterns. The most massive strategy is to prevent illegal migration at the border; forty percent of I.N.S. resources are devoted to the area of initial entry. Preliminary Report at 76. Further into the interior, detection and enforcement efforts are primarily geared toward places of employment. Once an illegal entrant is detected, he is either criminally prosecuted, deported, or told to leave voluntarily. The last procedure is the most widely used, since the I.N.S. has insufficient resources to institute formal proceedings against the overwhelming numbers of those detected.

While California's labor law may fit harmoniously into this framework of federal purpose and priorities, section 21.031 of the Texas Education Code is irreconcilable with the federal scheme. The California statute penalizes employers for not abiding by the employability criteria already established by Congress; there is no indication that Congress in any way intended to impose on illegal entrants the kind of penalty devised by defendants here. On the contrary, the federal scheme be-speaks the intent to deal with the problem of illegal aliens at the source, or as close to the source as possible; this approach is generally conceded to be the most humane, *see, e.g.*, Preliminary Report at 96. The federal government's method is to turn the illegal alien back at the border and destroy his main incentive for coming, rather than to let him enter and establish roots, and then treat him as if he were a second-class citizen.

Furthermore, federal laws consistently demonstrate a strong congressional commitment to education, in particular the education of disadvantaged children. For example,20 U.S.C. 241(a) announces the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

Nothing in the statute distinguishes between documented and undocumented children. *See* 20 U.S.C. §241(c). Moreover, federal law prohibits denial of educational opportunity to non-English speaking children through failure to provide bilingual education. 20 U.S.C. § 1703, *Lau v. Nichols*, 404 U.S. 563 (1974).

The federal government's commitment to expanding educational opportunity is also evidenced in the Protocol of Buenos Aires, cited by plaintiffs in their trial brief:

> The member states will exert the greatest efforts, *in accordance with their constitutional processes*, to ensure the effective exercise of the right of education on the following basis:
>
> (a) Elementary education compulsory for children of school age, shall also be offered to all others who can benefit from

> it. When provided by the State it shall be without charge. (Emphasis added.)

See 21 U.S.T. 607, T.I.A.S. No. 6847 (1970).

While none of these federal laws or policies precisely and expressly prohibits the state conduct complained of in this case, that is not dispositive of the preemption challenge, "[f]or when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed." Savage v. Jones, 225 U.S. 501, 533 (1912). The Texas statute challenged here defeats the clear implications of federal laws covering both illegal aliens and education of disadvantaged children.

In summary, federal law is geared toward the exclusion of illegal aliens. Illegal entry is a misdemeanor, punishable upon first commission by not more than six months imprisonment or $500 fine, or both; subsequent commissions are felonies. 8 U.S.C. §1325. However, criminal prosecutions are infrequently undertaken, and the primary enforcement tool is voluntary departure, Preliminary Report at 81-82. This simply restores the status quo, as if the entrant had never arrived. Because of the congruency of employment and presence in the United States, that is, the absence of any motivation to stay if employment is unavailable, the I.N.S. strategy of detecting illegal entrants at their place of employment has, albeit indirectly, the same basic purpose and effect as deportation. The federal government appears to have little interest in employing punitive measures other than as a deterrant in service of its major purpose of exclusion.

Nothing in the Immigration and Nationality Act indicates that additional burdens on illegal immigrants are to be imposed at the whim of the various states. Furthermore, federal laws dealing with education render denial of education to undocumented children among the additional penalties Congress would be least likely to tolerate. Certainly two of the reasons for congressional concern with education of poor, non-English speaking children are the conviction that merit is as likely to be found and developed in such children as in any others, as long as they are given a chance; and the tremendous disadvantages suffered by children who grow up uneducated in a modern society. The undisputed testimony at trial indicated that if these already disadvantaged children are denied an education when they are young, they will be forever relegated to the lowest level of employment. If the state refuses to educate them now, even a future grant of amnesty by Congress will not prevent many of these children from having been permanently stigmatized and cripped by their former illegal status. By virtue of its irreparability, this is a particularly harsh--perhaps even cruel and unusual--penalty for the state to impose for commission of a federal misdemeanor, and a penalty that sounds a distinctly discordant note in the midst of the fundamentally humane objectives served by relevant federal laws.[30]

By virtue of its lack of rationality, section 21.031 of the Texas Education Code violates the equal protection clause of the fourteenth amendment and hence is unconstitutional. Therefore, the defendants will be permanently enjoined from applying section 21.031 of the Texas Education Code and the policy adopted by the Board of Trustees of the Tyler I.S.D. on July 21, 1977, so as to deny free public education to any children in the Tyler I.S.D. solely on the basis of their status as undocumented Mexican aliens.

SIGNED and ENTERED this 14th day of September, 1978.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

Footnotes

1. The minor plaintiffs were represented by their parent or parents as guardians *ad litem*. Prior to the trial of this case on the merits, the court ordered that the action be maintained as a class action on behalf of all undocumented school-aged children of Mexican origin residing within the boundaries of the Tyler Independent School District.

2. Because of the focus on documentation in both the challenged Texas statute and the Tyler I.S.D. policy, the excluded children will be referred to throughout this opinion as "undocumented children." The court will use the term "illegal aliens" to refer generally to those persons who reside in the United States in violation of the Immigration and Nationality Act. Although the term may have unpleasant connotations, this court has chosen it in the interests of economy and clarity of expression.

3. Prior to its amendment in 1975, Tex. Educ. Code §21.031 provided:

> (a) *All children without regard to color* over the age of six years and under the age of 18 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) *Every child in this state* over the age of six years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission notwithstanding the fact that he may have been enumerated in the scholastic census of a different district or may have attended school elsewhere for a part of the year.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition *all persons* over six and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district. (Emphasis added.)

3. (continued)
It is perhaps of more than mere historical interest that the State Attorney General ruled that alien children were entitled under this statute to attend public school regardless of whether they were legal or illegal residents. Att'y Gen. Op. H-586 (1975). The opinion further stated:

> We believe the words "all" and "every" as contained in section 21.031 . . . do not permit exceptions to be created by local school boards.
>
> Whether the Legislature itself may establish an exception for illegal aliens has not been decided by the higher courts. While we recognize that the United States Supreme Court could sustain such an exercise of legislative power, the existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. and the Fourteenth Amendment to the United States Constitution.

Att'y Gen. Op. H-586 (1975), citing Bolonos v. Kiley, 509 F.2d 1023 (2d Cir. 1975); Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.--El Paso 1972, writ. ref'd n.r.e.). *See infra* at 16-17.

4. The complaint also alleges causes of action based on denial of due process and discrimination on the basis of national origin. These claims appear to have dropped out by the time of trial on the merits, and they are not argued separately in plaintiffs' trial brief.

5. *See* note 2 *supra*.

6. The basis for this conclusion is that none of the minor plaintiffs nor their parents appears to satisfy any of the preferences which govern eligibility for permanent resident status. As explained by William J. Chambers, District Director of the Dallas District of the United States Immigration and Naturalization Service, a witness for the State of Texas at the preliminary injunction hearing, eli-

6. (continued) gibility derives basically from two sources: family relationship with either a United States citizen or a permanent resident alien, or possession of certain occupational skills. Specifically, a United States citizen or lawful permanent resident can petition for immigration of a parent, spouse, child or sibling. A person must be 21 years of age in order to petition on behalf of a parent or sibling. Prerequisites for occupational preferences are either specialized professional skills or any skills of which the United States is at a given time experiencing a shortage. See 8 U.S.C.A. §§1151(b) and 1153(a)(1)-(a)(6).

7. The state court's conclusions regarding the purpose of §21.031 in effect restate the state's position as expressed in its Brief in Opposition to Application for Writ of Error. For an extensive discussion of this purpose, see *infra*.

8. In her opening statement, counsel for the state argued that "[t]here are cost factors which fall outside the average daily attendance costs in terms of lost textbooks, problems you would not have with the average student." Tr. 12/12 at 164. However not a shred of evidence was ever offered to substantiate the suggestion that undocumented children tend to lose or "remove" textbooks at a higher rate than their citizen or lawfully resident schoolmates.

9. The court finds only that the estimate was made, not that it is reliable.

10. The North-Houstoun Study involved the questioning of 793 apprehended illegal aliens of at least 16 years of age who had worked in the United States for wages for at least two weeks, and was designed to provide information about

10. (continued)
the characteristics of illegal aliens. The inherent bias of this study is described in the Preliminary Report at 126ff.

11. The conclusion that employment is the main incentive for illegal migration from Mexico has been consistently agreed upon. The undisputed testimony to this effect at trial is supported by every source this court has consulted. See, e.g., Preliminary Report at 89, 152 and passim; Miller, Immigration and National Law, 1977 Annual Survey of American Law 205; Catz & Lenard, The Demise of the Implied Federal Preemption Doctrine, 4 Hastings Const. L. Q. 295 (1977).

12. Defendants make much of the fact that the Supreme Court has never held that illegal aliens are entitled to equal protection of the laws, while it has accorded them due process, and that, in general, authority for such an inference is undeniably scarce. This dearth of authority, however, seems amply accounted for by the predictable unwillingness of illegal aliens fearing deportation to expose themselves, indeed to advertise the fact of their illegality by making it the focus of a lawsuit. The cases protecting the due process rights of illegal aliens generally involve the procedural adequacy of deportation proceedings, which are already underway. See, e.g., Wong Yang v. McCraw, 339 U.S. 33 (1950); Wong Wing v. United States, 163 U.S. 228 (1896).

13. Commentators have suggested the emergence of a sliding scale or intermediate scrutiny, see, e.g., Gunther, The Supreme Court 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); and various Supreme Court decisions indicate some flexibility in the test. See Craig v. Boren, 429 U.S. 190 (1977); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). A majority of

13. (continued)
the Supreme Court, however, has never explicitly sanctioned such an approach. *But see* San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

14. It is no answer to the *Rodriguez* dictum that the ability of illegal alien children to exercise free speech and participate in the political process is of no concern to the State of Texas. These children, and many more like them, are here and are likely to remain here. (See Findings of Fact, *supra* at 12.) The federal government has chosen, whether by act or omission, not to deport them. Many of them have younger siblings who are American citizens and who may someday be the means of legalizing the presence of the whole family. Developments in federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. As the Supreme Court has recognized, the benefits of education are not reserved to those whose productive utilization of them is a certainty: "[a]lthough an alien may be barred from full involvement in the political arena, he may play a role--perhaps even a leadership role in other areas of import to the community." Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).

15. It is not completely clear whether the statute itself, as opposed to the Tyler policy, contemplates admitting undocumented children to public schools upon payment of tuition. Subsection (a) of §21.031 clearly excludes them from the benefits of the Available School Fund, which means the school they attend could not legally draw state funds for them. Subsection (b) of the statute appears to permit only citizens or legally admitted aliens to attend the public schools at all. Subsection (c) of §21.031, however, directs the local boards of trustees to admit citizens and

15. (continued)
legally admitted aliens into the public schools free of tuition, which might imply that undocumented children might be admitted on the payment of tuition. The only two school districts which, to the court's knowledge, have made a policy of implementing §21.031, Houston I.S.D. and Tyler I.S.D., have read the statute to permit enrollment of undocumented children who pay tuition, and counsel for the state appears to have made the same assumption. The state's focus on financial restrictions as the major justification for its law supports the conclusion that the statute contemplates admitting undocumented children who pay tuition.

16. 8 U.S.C.A. §§1325 and 1326, making illegal entry a misdemeanor for the first commission and a felony for subsequent commissions, and making reentry of a deported alien a felony, do not distinguish between children and adults.

17. The statute provides, in pertinent part:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

18. Section 212(a)(14) of the McCarran-Walter Act provided, in pertinent part:

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> (14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission into the United States) and place (to which the alien is destined) to perfrom such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed.

19. Not all aliens are subject to §212(a)(14). The exclusions from its provision, which derive from the priority Congress has placed on certain family relationships, are specified in the last part of the section.

20. It is also interesting to compare another California law mentioned by the United States in its Post-trial Brief, under which the state reimburses a local district for the cost of educating an undocumented child, but requires local officials to forward a list of names of such children to the I.N.S. The court expresses no opinion as to the constitutionality of such a law, but mentions it only as a more effective way of discouraging illegal immigration through the public schools than charging tuition.

21. Bills prohibiting the employment of illegal aliens under various circumstances were introduced during the 1977 session of the Texas legislature, but none was reported out of committee. See, e.g., House Bills 174, 374 & 816.

22. There are two sides to the effect of illegal workers on a local labor market, and it is simply a question of political and economic preference whether the net effect is found to be good or bad. According to the Preliminary Report, and stated very simplistically, both illegal and legal immigration of workers increases the gross national product. If illegal workers can be hired at lower wages and in worse working conditions, profits rise and prices fall, resulting

22. (continued)
in small economic gains for many people. The argument against this view, of course, considers the displacement of low-income lawful resident workers and the dangers of an exploitative employment relationship. See Preliminary Report at 155ff. The federal government and California prefer to protect resident workers from displacement.

23. An identical statement is found in the state's Brief in Opposition to Application for Writ of Error submitted to the Supreme Court in Hernandez, supra, at p. 9.

24. It must be remembered that the "harm" referred to in Moreno was denial of benefits, exactly as in the instant case, rather than active persecution.

25. It is certainly true, as the state contends, that in many cases concerning "state regulation in the social and economic field," the Supreme Court has deferred to state decisions concerning allocation of resources, without probing too deeply. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio I.S.D. v. Rodriguez, 411 U.S. 1 (1973). However, these cases involved relative rather than absolute deprivations. When a legislature excludes a group entirely, whether or not that group is a suspect class, the Court has focused somewhat more sharply on the state's rationale for the exclusion, requiring a legitimate purpose that is, in fact, furthered by the classification. See San Antonio I.S.D. v. Rodriguez, 411 U.S. at 59 (Stewart, J., concurring).

26. The holding of Gilbert concerning the first amendment issue raised in that case may no longer be good law. However, this court has found nothing in the Supreme Court's later preemption decisions which overrides the quoted language.

27. See supra at 9-10.

28. In addition to being shared by legal Mexican immigrant children, the "special needs" of undocumented children which the state claims makes them so burdensome to educate are largely financed by federal funds. The free lunch, breakfast, and clothing are federally subsidized programs in their entirety, while almost half of the cost of bilingual education in Texas is also paid for by the federal government. None of these programs limits funds to documented children. This further undermines the plausibility of the state's decision to save money by excluding these children.

29. See note 17 supra.

30. Of course, the proposed federal legislation--which would be an even clearer indicator of appropriate judicial action than presently exists--does not have the force of law. Nevertheless, the pendency of such legislation underscores the dangers inherent in state regulation of resident illegal aliens which goes beyond federal regulation on that front. If permitted to do so, a state might take action, as Texas has done with §21.031, which could thwart any future congressional amnesty program. President Carter, for example, has recommended adjustment of status in order to avoid "a permanent 'underclass' of millions of persons who have not been and cannot practicably be deported." Office of the White House Press Secretary, President's Message to the Congress on Undocumented Aliens at 5 (Aug. 4, 1977). Should undocumented children currently residing in Texas be denied education, the seeds of that "underclass" will already irretrievably have been sown.

I [illegible] & A.
[illegible] 10/2/78 BY [illegible]
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ACTION
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FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 14 1978
MURRAY L. HARRIS, CLERK
BY DEPUTY [illegible] Barton

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

J. and R. DOE, ET AL.)
)
V.) CIVIL ACTION NO. TY-77-261-CA
)
JAMES PLYLER, ET AL.)

ORDER

Defendant State of Texas has moved this court to reconsider plaintiffs' motion to amend pleadings, or in the alternative, to permit defendant to reopen the case to present additional evidence. The court, having considered defendants' motion and plaintiffs' opposition thereto, does not find them to be well taken. It appearing that the amended complaint does not state a cause of action against any school district other than the Tyler Independent School District, and since this court intends to order relief only against the Tyler Independent School District and any other named defendants standing in the place of the State of Texas who were represented by the Attorney General of the State of Texas, accordingly such motions are hereby DENIED.

SIGNED and ENTERED this 14th day of September, 1978.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

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MURRAY L. HARRIS, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By: [illegible] Barton

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U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

SEP 14 1978

MURRAY L. HARRIS, CLERK
BY
DEPUTY Maga Barton

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

J. and R. DOE, ET AL.)
)
V.) CIVIL ACTION NO. TY-77-261-CA
)
JAMES PLYLER, ET AL.)

PERMANENT INJUNCTION

Based upon the findings of fact and conclusions of law incorporated in the Memorandum Opinion of this court this day filed, it is

ORDERED, ADJUDGED and DECREED that defendants James Plyler, Superintendent of the Tyler Independent School District, and Robert Dobbs, Charles Childers, Carl Ross, Martin Edwards, Vernon Goss, Michael Breedlove and Robert Randall, in their official capacities as members of the Board of Trustees of the Tyler Independent School District, their agents and successors in office, and all those acting in concert with them, and the State of Texas, be, and they are hereby, permanently restrained and enjoined from refusing to permit the named plaintiffs, or any other member of the class of undocumented school-aged children of Mexican origin now or hereafter residing within the boundaries of the Tyler Independent School District, to enroll in the public schools of such district; from requiring them to pay tuition fees; and from applying section 21.031 of the Texas Education Code and the policy adopted by the Board of Trustees of the Tyler Independent School District on July 21, 1977, so as in any way to deny free public education to any children in the Tyler Independent School District, solely on the basis of their status as undocumented Mexican aliens.

SIGNED and ENTERED this 14th day of September, 1978.

Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

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MURRAY L. HARRIS, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By: Maga Barton

APPENDIX B

- PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
- COURT ORDER - ROE VS. HOLM

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

MIDLAND-ODESSA DIVISION

J. AND R. ROE, as Next Friend of
I. ROE, T. and M. TOE, as Next
Friend of R., J. and L. TOE,
F. and S. MOE, as NEXT FRIEND of
J. and F. MOE, and M. and A. SOE,
as NEXT FRIEND of E. F. and R.
SOE,

Plaintiffs,

CIVIL ACTION NO.

-vs-

MO-79-CA-49

WILLIAM HOLM, Superintendent of
the Ector County Independent School
District, in his official capacity;
FRED JONES, GARY WHITEHEAD, SAM
GIPSON, JOHN QUISENBERRY, SHIRLEY
HUFFAKER, BOB CLARK and VICKI GOMEZ,
in their official capacities as members
of the Board of Trustees of the Ector
County Independent School District,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Plaintiffs in the above-entitled cause and move this Court to issue a preliminary injunction.

A PRELIMINARY INJUNCTION IS PROPERLY ISSUED IN THIS CAUSE

This action, brought by undocumented aliens who reside in Ector County, Texas, on behalf of themselves and all others similarly situated, challenges the constitutionality and lawfulness of Section 21.031 of the Texas Education Code and the related policy of the Ector County Independent School District ("ECISD"), both of which operate to prevent the school-age plaintiffs from attending public school without paying a prohibitive tuition.

Effective September 1, 1975, Section 21.031 provides for the admission of students into the school districts in the State of Texas. It reads as follows:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

The related admission policy concerning alien students of the ECISD is delineated in a memorandum from E. K. Downing, Director of Pupil Personnel, dated August 30, 1978. Under the terms of the memorandum, all principals are instructed to admit only alien students in possession of a permit (I-94), a permanent resident Alien Registration Receipt Card (I-151), a Student Card (I-20), or a _Silva_ letter issued under authority of _Silva v. Levi_, Complaint #76C-4268 (N.D. Ill E.D. filed 1976), a class action enjoining the U. S. Immigration and Naturalization Service from deporting members of the class. The practice of the ECISD is to refuse tuition-free admission to alien students who do not possess one of the documents, and to enroll such undocumented students only upon payment of a tuition fee.

Plaintiffs seek to have the Court enjoin the Defendants, their agents, employees and those acting in concert with them from preventing the registration, enrollment and attendance of the plaintiffs and all others similarly situated in the ECISD for the commencement of the 1979-1980 school year, and further enjoin the Defendants, their agents, employees and those acting in concert with them from charging these plaintiffs and all others similarly situated a tuition fee for their attendance.

The courts, including the Fifth Circuit, have generally looked to four factors in determining the propriety of issuing a preliminary injunction: (1) the plaintiffs' likelihood of prevailing on the merits, (2) the possibility of irreparable harm to the plaintiffs, (3) the counterbalancing risk of harm to the defendants, and (4) the service of the public interest. Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976); Buchanan v. United States Postal Service, 508 F.2d 259, 266 (5th Cir. 1975).

The first factor, the likelihood of the plaintiffs prevailing on the merits, does not require absolute certainty. If the balance of hardships is substantially in the plaintiffs' favor, it "will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2nd Cir. 1953). Plaintiffs present a discussion of the merits of this case in their accompanying Memorandum in Support of the Motion for Preliminary Injunction. As shown therein, this case raises serious questions of Constitutional and statutory law and, as the arguments demonstrate, support for the Plaintiffs' position on the large number of legal issues raised is substantial.

The second factor, the possibility of irreparable harm in the absence of an injunction, is raised to grave and even dangerous heights when the admission to school of a young child is what hangs in the balance. None of the minor plaintiffs are currently attending school. None can produce the documents satisfactory to the ECISD for tuition-free admission. None live in families that can afford the tuition fee. If forced to await a decision on the merits, plaintiff children will most certainly miss the beginning of the school year, a most important time in the educational cycle, and perhaps a much longer period of the academic term.

Because of the policy of the ECISD, which was implemented prior to the 1978-1979 school year, the minor plaintiffs have been prohibited from going to school for the past year. Being one year behind in school is harmful enough; it only exaggerates the further deprivation that will occur if the children are kept away from the classroom a *second year*.

The Courts have long viewed compulsory absences from school with great concern and have imposed due process limitations on school officials expelling or suspending students for more than a minimum number of days. See, e.g. *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Boykius v. Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974); *Texarkana Independent School District v. Lewis*, 470 S.W.2d 727 (Civ. App., 1971).

In the name of academic freedom, it has been held that a preliminary injunction was necessary to prevent irreparable harm that would result from the firing of a public school *teacher*. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). Surely the harm which follows the exclusion of the student -- the recipient of academic freedom and classroom education -- is concomitant in its irreparability to that which accompanies the banishment of the teacher.

Similar justifications for the injunction are present here as existed in *Morales v. Turman*, 364 F.Supp. 166 (E.D. Tex. 1973), where the court issued a preliminary injunction to enjoin certain practices of the Texas Youth Council which would work an irreparable injury, of both a physical and a *psychological* nature, on the plaintiff class of young people.

Furthermore, the authorities state that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11 Wright & Miller, *Federal Practice and Procedure*, Section 2948 (p. 440), citing numerous cases. Here the constitutional rights of due process and equal protection of the laws are at the forefront of the litigation, and their continued denial is irreparable harm in itself. The additional personal harm suffered by the Plaintiffs in the absence of education makes the case for an injunction that much more compelling.

The third factor calls for counterbalancing the harm to the Plaintiffs with the difficulties which the defendants would encounter if an injunction issued. Such difficulties, if existent, are minimal. Prior to the 1978-1979 school year, children who fit within the presently defined Plaintiff class were enrolled in and attended the Ector County schools without apparent harm to the defendants. Furthermore, after the change in policy, and after exclusion of the children, the budget of the Ector County school district did not decrease, school taxes were not lowered, and no perceptible benefits occurred to the defendants. Therefore, the enrollment of the young Plaintiffs pursuant to an injunction would not cause any hardship to the school district for which it is unequipped or which it has not adequately and smoothly handled in the past.

Plaintiffs, upon information and belief, number the effected class at approximately one hundred school-age children. Assimilation of this small number of students in the relatively large Ector County school system is not a difficult task. No new building need be constructed. No major revamping of educational programs need occur.

If this Court sees fit, it can join the State of Texas as a defendant, pursuant to the motion of the present Defendants (a motion which is not contested and indeed is assented to by Plaintiffs), and enjoin the State and its administrative branch, the Texas Education Association, from enforcing Section 21.031(a) and denying the ECISD the per-pupil monetary allotment from the Available School Fund for the children of the Plaintiff class.

The money which defendants would then receive from the Available School Fund */ for each student entering from the Plaintiff class would offset whatever minor expense that might accrue as a result of an injunction admitting these children to school.

With these facts in mind, it is evident that any harm which the ECISD might encounter were an injunction to issue is miniscule in comparison to the hardship suffered by some one hundred children who would be kept out of school.

The fourth and final factor to be assessed in determining the wisdom of a preliminary injunction is the public interest. This clearly lies on the side of the extension of education in the benefit of society. The importance of education as a public matter and a public function has been recognized by lay authorities and courts alike, including the unanimous voice of the United States Supreme Court in Brown v. Board of Education, 374 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where that state has undertaken to provide it, is a right which must be made available to all on equal terms.

This is particularly true in light of the fact that a large percentage of the undocumented alien children will eventually

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*/ Plaintiffs believe that to be in the amount of $284 per child.

95

become uncontestably lawful resident aliens or even citizens. Dr. Gilbert Cardenas, a noted expert on migration, testified at the trial in Doe v. Plyler, 458 F.Supp. 569, 577 (E.D. Tex. 1978), that of the legal alien workers presently in the country, fifty to sixty percent were, at one time, illegal aliens. Roland Heston, Director of the Immigration and Naturalization Service for the Houston District, testified in the same trial that undocumented children often live in this country for years and eventually adjust their status through marriage to a citizen or permanent resident. As the Doe Court said in giving credence to this testimony, "witnesses from both sides testified that the illegal alien of today may well be the legal alien of tomorrow." 458 F.Supp. at 577. */

It is in the public interest that these potential permanent residents and participants in American society receive the benefits of undelayed education. For while each individual gains personally from the learning experience, the sum of the individuals so educated accrues to the advantage of an enlightened society.

An additional point deserves mention. It has been parroted about that the purpose of the preliminary injunction is to preserve the "status quo." N.W. Controls, Inc. v. Outboard Marine Corp., 317 F.Supp. 698 (D. Del. 1970). In a narrow sense, it could be said that since the Plaintiff children were not allowed to attend public school during the past academic year, this state of non-attendance is the "status quo." But a broader assessment is required in a case of this importance.

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*/ The court also took judicial notice of the various presidential and legislative proposals which would legalize the status of many children who are now undocumented. 458 F.Supp. at 577-578.

First of all, the "status quo" has been generally defined as the "last uncontested status which preceded the pending controversy." Westinghouse Electric Corp. v. Free Sewing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969). While this lawsuit was filed only this summer, the constitutionality of Section 21.031 of the Texas Education Code has been fought in administrative proceedings and in the courts since its inception. See, Hernandez v. Houston Independent School District, 558 S.W.2d 121, ref. n.r.e. (Civ. App. 1977); Doe v. Plyler, 458 F.Supp. 569 (E.D. Texas, 1978). Local school district policies which are identical to the ECISD policy in that they are based on Section 21.031 and exclude undocumented aliens from tuition-free public education have undergone similar challenges during the past few years. Hernandez, supra (Houston I.S.D.); Doe v. Plyler, supra (Tyler I.S.D). At present, lawsuits contesting Section 21.031 and related school board policies in Houston, Baytown, Pasadena, and Dallas are pending in federal district courts in this state. Garza v. Reagan, Civil Action No. H-78-2132 (S.D. Tex.) (Houston I.S.D., Baytown I.S.D., and Goosecreek I.S.D. -- consolidated for discovery purposes); Boe v. Wright, Civil Action No. 79-0440-D (N.D. Texas) (Dallas I.S.D). In truth, the last uncontested status which preceded this controversy in terms of undocumented alien school children in the State of Texas was that they were admitted to the public schools tuition-free. Every effort to deny them this right has met with Constitutional and statutory dispute.

More importantly, however, than the definitions of "status quo" and "last uncontested status" is the conviction that the doctrine should not woodenly defeat the ends of justice. Speaking about the "status quo" formulation, Professors Wright and Miller say "it is regrettable if it leads to the denial of an injunction when the important conditions for its issuance have been satisfied. The doctrine has been subject to academic criticism and frequently is ignored or rejected by the courts." 11 Wright & Miller, "Federal Practice and Procedure, Section 2948 (p. 466), citing "Developments in the Law -- Injunctions," 78 Harvard Law Review 994, 1058 (1965) and National Association of Letter Carriers, AFL-CIO v. Sombrotto, 449 F.2d 915, 921 (2nd Cir. 1971) (J. Friendly). The Fifth Circuit put it even more clearly:

> It is the threat of harm that cannot be undone which authorizes exercise of this equitable power to enjoin before the merits are fully determined. See Sampson v. Murray (415 U.S. 61 (1974) and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Maintenance of the status quo is only a sometimes concomitant of preventing irreparable harm -- never the touchstone for such injunctive relief. Indeed, the concept itself is an elusive one at best.
>
> Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975).

In summary, we can only point to the "threat of harm that cannot be undone" which is so important in the determination of whether to issue the injunction. We can only emphasize that, without immediate relief, the Plaintiff children may miss a year of school to which they are constitutionally entitled. A year of schooling can never be replaced. The children are a year older, a year behind their classmates, a year of doing nothing but staying at home.

WHEREFORE, Plaintiffs pray that the preliminary injunction issue forthwith.

Respectfully submitted,

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By Warren Burnett
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Attorney for Plaintiffs

Of Assistance:
DAVID GILLES
ROBERT B. McDUFF

FILED
AUG 1 4 1979
CHARLES W. VAGNER, Clerk
By BT
Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

J. AND R. ROE, ET AL.)
)
V.)
)
WILLIAM HOLM, Superintendent,)
Ector County Independent)
School District, et al.)
)
AND) MO-79-CA-49
)(Consolidated with MO-79-CA-54)
JOAQUIN, JIMMY AND RODRIGO)
COE, ET AL.)
)
VS.)
)
WILLIAM HOLM, Superintendent,)
Ector County Independent)
School District, a/k/a ECISD,)
ET AL.

ORDER

On this 14th day of August, 1979, came on to be heard by the Court the motion for continuance filed by the State of Texas with respect to a hearing on Plaintiff's Motion for Preliminary Injunction, and the Court having considered the same, the response thereto by the ECISD and the arguments of all counsel, enters the following order:

It is ordered that said hearing be continued until the month of October, 1979, subject to the further order of this Court, or another Court obtaining proper jurisdiction of this case.

It is further ordered by this Court that the State of Texas is enjoined from enforcing the provisions of "Section 21.031" of the Texas Education Code during the pendency of this motion on the further order of the Court or another Court obtaining proper jurisdiction of the case and the ECISD is enjoined to admit illegal alien students as they were admitted prior to the implementation of "Section 21.031" of the Texas Education Code by the District during the pendency of this motion or the further order of this Court or another Court obtaining proper jurisdiction of the case.

It is the further order of the Court that the entry of this order shall not prejudice the rights of any party hereto or constitute any waiver of any matter alleged herein or that may be alleged by any party hereto.

SO ORDERED this 14th day of August, 1979.

UNITED STATES DISTRICT JUDGE

A true copy of the original I certify
Clerk, U. S. District Court
By: Deputy

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APPENDIX C

- COURT ORDER
- FINDINGS OF FACT AND CONCLUSIONS OF LAW
  BOE VS. WRIGHT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 13 1979
JOSEPH McELROY, JR., CLERK
BY ________ Deputy

COPY

A. BOE, BY HIS NEXT FRIEND, §
B. BOE, ET AL, §
Plaintiffs §
§
V. § CIVIL ACTION NO. CA-3-79-0440-D
§
LINUS WRIGHT, SUPERINTENDENT OF §
THE DALLAS INDEPENDENT SCHOOL §
DISTRICT IN HIS OFFICIAL §
CAPACITY, ET AL, §
Defendants §

ORDER DENYING PRELIMINARY INJUNCTION

The motion for preliminary injunction filed by the plaintiffs came on for consideration before the court, the Honorable Robert M. Hill, United States District Judge. The court has considered the motion, briefs, testimony and oral argument of counsel and the court having made a determination in its findings of fact and conclusions of law that the motion should be denied,

It is ORDERED that the plaintiffs' motion for preliminary injunction is DENIED.

Dated this 13 day of September, 1979.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED M
SEP 13 1979
JOSEPH McELROY, JR., CLERK
BY R Edmiston Deputy
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A. BOE, BY HIS NEXT FRIEND, §
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§
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§
LINUS WRIGHT, SUPERINTENDENT OF §
THE DALLAS INDEPENDENT SCHOOL §
DISTRICT IN HIS OFFICIAL §
CAPACITY, ET AL, §
Defendants §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came on before the court the plaintiffs' Motion for Preliminary Injunction in the above-styled and numbered cause. The court, having considered the pleadings, testimony, stipulations, and arguments of counsel makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This case, which the court has certified as a class action, was brought pursuant to 42 U.S.C. section 1983 which prohibits the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

2. Plaintiffs contend that section 21.031 of the Texas Education Code and Administrative Regulation 5118(a) of the Dallas Independent School District ("DISD") are unconstitutional in that they violate the equal protection, due process, and supremacy clauses of the federal Constitution.

3. Each of the named plaintiffs and the class they have been certified to represent are undocumented aliens. Each of the minor plaintiffs herein, each next friend and each class member resides within the boundaries of the DISD.

4. DISD is a public school district organized and operating pursuant to the laws of the State of Texas. Defendant Linus Wright is General Superintendent of the DISD. Defendants Kathlyn Gilliam, Sarah Haskins, Robert Medrano, Bradford N. Lapsley, Gerald M. Stanglin,

Jill Foster, Harryette Ehrhardt, and Robert L. Price are each currently members of the Board of Trustees of the DISD. All defendants are being sued in their official capacities.

5. Effective September 1, 1975, Texas enacted Section 21.031 of the Texas Education Code which states:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of twenty-one on the 1st day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of twenty-one years on the 1st day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over twenty-one years of age at the beginning of the scholastic year if such person or his parent, guardian or the person having lawful control resides within the school district.

6. Section 5118(a) of the Administrative Regulations of the Dallas Independent School District reads, in pertinent part, as follows:

> B. Illegal Aliens
>
> Aliens residing in the DISD who can not show proof of legal admittance to this country are not entitled to public school education. (Reference House Bill #1126, 64th Legislature.)

7. School principals are responsible for determining that alien children seeking enrollment are legally admitted aliens.

8. None of the named plaintiffs or the class they have been certified to represent have sufficient documentation of lawful immigration status to satisfy the school district's definition of "legal alien" as defined by Section 5118(a) of the District's Administrative Regulations.

9. All of named plaintiffs and the class they have been certified to represent have or would be denied admission to the schools of the

DISD by virtue of the District's enforcement of Section 5118(a) of the DISD's Administrative Regulations.

10. There is a direct correlation between attendance in school and the normal psychological, social, moral and intellectual development of a child.

11. A significant percentage of the plaintiff class will suffer some degree of injury from being excluded from school between the beginning of the school year and the trial on the merits of this case. For some of the plaintiff class, this injury may be severe, and no money damages could compensate them for the damage done.

12. Although it is impossible to ascertain with certainty the number of undocumented alien children of school age that reside within the boundaries of the DISD, it is probable that 2,000 to 5,000 such ? children reside in the DISD. It is also probable that a number of these children do not speak, read or write English.

13. The DISD currently has a shortage of approximately 100 bilingual teachers and such shortage would be very difficult to fill before this case is tried on the merits. The addition of a large number of students whose primary language is Spanish would greatly compound this problem and would adversly effect the bilingual educational program of the DISD.

14. It is probable that the homes of undocumented alien children are concentrated in certain areas of the DISD so that their impact on the DISD will fall more heavily on twenty schools within these areas. The schools in these areas, with a few exceptions, are now filled to capacity.

15. Any busing of undocumented alien children in kindergarten through third grade would require a modification of Judge William M. Taylor's order desegragating the DISD.

16. The addition of 2,000 to 5,000 monolingual Spanish-speaking students at this time would cost the DISD several million dollars.

17. The DISD has insufficient funds in reserve or othewise available which could be used to offset the costs of educating the plaintiff class.

18. The DISD has set its tax rate and tax assessments for the current school year and cannot now change those rates or assessments to meet any unexpected financial needs incurred during the 1979-80 school year.

19. Any large influx of undocumented alien children at this time could have a detrimental effect on the quality of education of the children presently attending DISD schools.

20. It is in the public interest to maximize the quality of public education and to minimize the burden on the taxpayers of the cost of public education.

21. The public interest is served when all persons within a society possess the opportunity to receive an education.

22. Section 21.031 of the Texas Education Code and DISD Administrative Regulation 5118(a) are rationally related to preserving the limited resources available for public education for citizens and legally admitted aliens.

Conclusions of Law

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. Sections 1343(3) and 1343(4).

2. Venue is proper pursuant to 28 U.S.C. Section 1391.

3. Undocumented aliens are protected by the provisions of the due process clause of the fourteenth amendment of the United States Constitution. See Mathews v. Diaz, 426 U.S. 67, 77 (1976) (dictum); Wong Wing v. United States, 163 U.S. 228 (1896).

4. Undocumented aliens are protected by the equal protection clause of the fourteenth amendment of the United States Constitution. See Holley v. Lavine, 529 F.2d 1294 (2d Cir.), cert. denied, 426 U.S. 954 (1976); United States v. Barbera, 514 F.2d 294, 296 n.3 (2d Cir. 1975); Doe v. Plyler, 458 F.Supp. 569 (E.D. Tex. 1978).

5. State and local classifications based on alienage may be suspect and therefore may require strict judicial scrutiny. Nyquist v. Mauclet, 432 U.S. 1 (1977).

6. Such strict scrutiny, however, rests on the assumption that the aliens in question are legally within this country. See, e.g., Foley v. Connelie, 435 U.S. 291, 295 (1978) ["These exclusions struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." (emphasis added)].

7. The exclusion of those who are not "legally admitted aliens," therefore, need not meet the exacting test of strict scrutiny. DISD and the State of Texas, to justify their policies, must demonstrate that there is a rational relationship between the interest sought to be protected and the limiting classifications.

8. Although the Supreme Court has repeatedly affirmed the value of education, education is not a "fundamental right" which will trigger strict scrutiny. See Ambach v. Norwick, 47 U.S.L.W. 4387, 4390 n.7 (April 17, 1979); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973).

9. The federal government has exclusive jurisdiction over the conditions of admission and deportation of aliens to and from the United States.

10. Section 21.031 of the Texas Education Code and Administrative Regulation 5118(a) of the DISD are designed to address local educational problems, not to regulate immigration. It is unlikely that these regulations (a) constitute an impermissible incursion on the federal government's exclusive power to regulate immigration; (b) operate in a field in which federal regulation allows no exercise of state regulatory power; or (c) stand as an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting the Immigration and Naturalization Act. DeCanas v. Bica, 424 U.S. 351 (1975).

11. Because of the above-listed principles, the court cannot find at this time that plaintiffs will probably succeed on the merits.

12. Deprivation of educational opportunities until the trial of this case on the merits is likely to cause irreparable injury to at least some of the plaintiff class. See Black's Law Dictionary 924 (4th ed. 1951).

13. The impact on the DISD of the admission of the class into school at this time would be severe.

14. The public interest would be both served and disserved by admission of the plaintiffs at this time. The public would be benefitted by the education of all children who live and may continue to live in Dallas. On the other hand, the public interest may be harmed in the short-run period which would be covered by a preliminary injunction if the reallocation of already scarce resources causes the quality of education in the DISD to decline.

15. After balancing the four relevant factors (probability of success on the merits, irreparable injury to plaintiffs, impact on defendants, and the public interest), this court has determined that those factors militating against preliminary injunctive relief outweigh those favoring preliminary relief, and therefore plaintiffs' motion for preliminary injunction should be denied.

16. Any finding of fact deemed a conclusion of law is so adopted and any conclusion of law deemed a finding of fact is so adopted.

17. This case is set for trial on the merits on November 19, 1979, at 9:30 A.M.

Dated this 13th day of September, 1979.

United States District Judge

APPENDIX D

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

GARZA VS. REAGAN

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

GASPAR GARZA AND
VERONICA PALACIOS, BY HER
NEXT FRIEND,
GASPAR GARZA;

VERONICA RODRIGUEZ, BY HER
NEXT FRIEND, ANGELICA
RODRIGUEZ;

VERONICA MANZANO, MARIA
GUADALUPE MANZANO, AND
FRANCISCO JAVIER MANZANO,
BY THEIR NEXT FRIEND,
GUADALUPE MANZANO,

PLAINTIFFS,

V.

BILLY REAGAN, SUPERINTENDENT
OF THE HOUSTON INDEPENDENT
SCHOOL DISTRICT, IN HIS
OFFICIAL CAPACITY; WILLIAM E.
HARWELL, BETTY LOU ALEXANDER,
TARRANT FENDLEY, ERNEST
McGOWAN, LOUIS HARRIS,
WILLIAM HOLLAND, AND RAY
MORRISON OF THE BOARD OF
TRUSTEES OF THE HOUSTON
INDEPENDENT SCHOOL DISTRICT,
IN THEIR OFFICIAL CAPACITIES;
TEXAS EDUCATION AGENCY; STATE
OF TEXAS

DEFENDANTS.

CIVIL ACTION NO.

H-78-2132

PLAINTIFFS' MEMORANDUM OF AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, the plaintiffs in the above-mentioned action and file this their Memorandum Of Authorities In Support Of Their Motion for Preliminary Injunction, and would show unto the Court the following:

CLERK, U. S. DISTRICT COURT
RECEIVED
AUG 10 1978
SOUTHERN DIST. OF TEXAS
HOUSTON, TEXAS

OF COUNSEL:

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633 So. Shatto Place
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CERTIFICATE OF SERVICE

I, ISAIAS D. TORRES, certify that the foregoing instrument was sent certified Mail, Return Receipt Reauested, on this the __________ day of __________, 1979, to the following counsel for defendants:

Mr. Kelly Frels
Bracewell & Patterson
2900 South Tower, Pennzoil Place
Houston, Texas 77002

Mr. Richard Arnett
Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

____
ISAIAS D. TORRES

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I.

Introduction and Procedural Posture of The Case

Plaintiffs in this action for declaratory and injunctive relief challenge the following practices:

(1) Exclusion of plaintiff children by defendant Texas Education Agency ["T.E.A."] from participating in the Available School Fund of the State of Texas pursuant to the alienage provisions of §21.031, Texas Education Code [A true and correct copy of §21.031 is attached hereto as Exhibit "A" and is incorporated by reference]; (2) Exclusion of plaintiff children by defendant Houston Independent School District ["H.I.S.D."] from participating in a tuition-free public education pursuant to Section 701.000 of the H.I.S.D. Administrative Procedures [A true and correct copy of §701.000 is attached hereto as Exhibit "B" and is incorporated by this reference]; (3) Establishment of arbitrary tuition fee levels and failure to waive tuition fees for indigent alien children by H.I.S.D.; and (4) Failure to provide a due process administrative hearing or procedure to plaintiff children excluded from a tuition-free public education solely because of their alien status. Plaintiffs allege that these practices violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the Supremacy Clause of Article VI to the U.S. Constitution, the Universal Declaration of Human Rights adopted by the United Nations, the Protocol of Buenos Aires, and Section 20.53 of the Texas Education Code. [See, Plaintiffs' Second Amended Complaint (hereinafter "Second Amend. Comp.") at pages 7-9; see also, Plaintiffs' First Amended Complaint (hereinafter "First Amend. Comp.") at pages 9-14].

The complaint in the herein action was filed on November 6, 1978. Plaintiffs' First Amended Complaint was filed on November 15, 1978. Defendant H.I.S.D. has not filed an answer, but filed a Motion to Dismiss on November 8, 1978. Defendant T.E.A. filed an Answer and Motion to Dismiss on December 8, 1978. Plaintiffs filed their Memorandum in Opposition to the Defendants' Motion to Dismiss on February 22, 1979. Defendant H.I.S.D. filed a second Motion to Dismiss on June 26, 1979. Plaintiffs filed their Memorandum in

Opposition to the Defendants' Motion to Dismiss on July 23, 1979. Plaintiffs' Motion for Leave to File Their Second Amended Complaint was filed on July 23, 1979.

Plaintiffs were deposed by defendants on January 10, 1979, January 18, 1979, and February 1, 1979. Defendant Billy Reagan was deposed by plaintiffs on January 8, 1979 and defendant T.E.A. represented by Alton Bowen was deposed on January 9, 1979. The Houston District Director of the Immigration and Naturalization Service (I.N.S.), Paul B. O'Neill, was deposed on July 12, 1979. The Houston Immigration Judge, James R. Smith, was deposed on July 12, 1979.

The courts have generally looked to four factors in determining if a preliminary injunction should properly issue. In Martinez v. Mathews, 544 F.2d 1233 (5th Cir. 1976) the Court set forth these factors: (1) the plaintiffs' likelihood of prevailing on the merits; (2) the possibility of irreparable harm to the plaintiffs; (3) the counterbalancing risk of harm to the defendants; and (4) the public interest. [Id., 1243; see also, Buchanan v. U.S. Postal Service, 508 F.2d 259, 266 (5th Cir. 1975); Florida Medical Ass'n v. Dept. of H.E.W., 454 F.Supp. 326, 334 (M.D. Fla. 1978)]. Plaintiffs set forth below the reasons why they have met the requirements of all four factors.

II.

History and Implementation of §21.031 and the H.I.S.D. Policy

A. H.I.S.D. School Policy Prior to 1975 Amendment to §21.031

Prior to the 1975 amendment to §21.031, H.I.S.D. had a policy of not permitting alien children to be admitted to tuition-free public schools unless one of the parents or guardians was (1) a U.S. citizen, or (2) a "resident alien." [Reagan Deposition at 40 and Exhibit Number One] On April 18, 1975, the Texas Attorney General ruled this type of practice illegal. [A true and correct copy of this ruling is hereto attached as Exhibit "C" and is incorporated by this reference]. The H.I.S.D. changed its admission policy to conform to the Attorney General's ruling. [Reagan Deposition at Exhibit Number Two]. This revised provision stated:

> Residence for free school purposes occurs and should be extended to all children regardless of their nationality, race, or creed. [Ibid., (Emphasis added).]

B. T.E.A. State Policy Prior to 1975 Amendment of §21.031

Prior to the 1975 amendment to §21.031, T.E.A. had no policy of limiting the Available School Fund to only U.S. citizens and "legally admitted aliens." For Instance, on April 30, 1975, in response to a letter from legal counsel of the Houston Independent School District, the T.E.A. ruled that:

> Regardless of whether alien children are "legally" or "illegally" within the United States, a public school district of this state is entitled to count for Foundation School Program benefit purposes the Average Daily Attendance (ADA) earned by alien children (as other children eligible to attend) who are resident(s) in the district with parent, guardian or the person having lawful control. [Reagan Deposition at Exhibit Number 6].

This particular opinion by T.E.A. was a direct result of the April 18, 1975, Texas Attorney General opinion memorandum [supra] which ruled that under §21.031, prior to its 1975 amendment, of the Texas Education Code, alien children within the state were entitled to attend public school in the district of their residence, regardless of whether they may be "legally" or "illegally" within the United States. [Ibid.].

C. H.I.S.D. Policy Subsequent to 1975 Amendment to §21.031

In May 1975 the Texas legislature amended §21.031 to exclude from participation in the Available School Fund children who are neither United States citizens or "legally admitted aliens." The statute as amended further informs the independent school districts of Texas that they are only required to admit United States citizen children and "legally admitted" alien children into the schools tuition free. It does not allow total exclusion from the public schools of alien children not legally admitted. In fact, section 21.032 , Texas Education Code, makes school attendance mandatory "for all children" residing in the State of Texas. Thereafter, on July 28, 1975, the Board of Trustees of the H.I.S.D. adopted new administrative regulations which required the payment of tuition by children who are not United States citizens or "legally admitted aliens." [See Exhibit B attached hereto.][1]

The H.I.S.D. School Board, through its administrative procedures, has specifically designated the local principal and the Office of Pupil Transfer as the officials in charge of making a determination if the applicant child is a "legally admitted alien" under §701.010(d) and therefore admissible to a tuition-free public school. [See Exhibit B, §701.010(c).] Under current H.I.S.D. administrative procedures, after a school principal excludes a child from a tuition-free public education due to the child's immigration status, the principal is required to refer the excluded child to the Office of Pupil Transfer located within the H.I.S.D. Administrative Building. There is no provision in the procedure or policies for provisional admittance. [Reagan Deposition at 7].

There are no written instructions other than §701.010(c) issued by the H.I.S.D. school board and superintendent which indicate to the Pupil Transfer Office what parents should do following a receipt of a denial for admission from the Pupil Transfer Office [Reagan Deposition at 8, 14-15, 17, 22-24]. §701.010(c) states that the Pupil Transfer Office, following a denial of admission, "will advise the parents of what steps should be taken in order to obtain eligibility for admission ..." [Emphasis added].

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[1] Other major metropolitan school districts throughout the country have addressed the problem of alien children in their public schools and have reached opposite conclusions to that of H.I.S.D. For instance, the New York City Board of Education passed a resolution in December 1978 which allows for tuition-free education to all children regardless of their immigration status since "the monitoring of the immigration status of a child or parent is not a proper function of the New York City Board of Education." [A true and correct copy of this resolution is hereto attached as Exhibit "D" and is incorporated herein by this reference]. In addition, the Chicago Board of Education voluntarily changed on January 3, 1979 its practice of excluding certain alien children after a federal lawsuit had been filed. [See

(Footnote #1 con't. on page 5)

Plaintiffs have testified that in this connection they were simply told to go to the Immigration Service. [Deposition of Maria Luisa Valdes Manzano at 90]. Nothing in writing is given to the parents of excluded children explaining what, if any, administrative appeal rights are available. [Deposition of Lon Wheeler at 14; Deposition of Maria Luisa Valdes Manzano at 117].

The Tyler (Texas) Independent School District has been permanently enjoined by a federal court from restricting tuition-free public education based on alienage. [Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978)].

D. T.E.A. State Policy Subsequent to 1975 Amendment to §21.031

T.E.A. implemented the alienage provisions of §21.031 by issuing a letter to all school districts in which a list of certain documents represented evidence that an alien was "legally admitted." [Reagan Deposition at Exhibit Seven]. T.E.A.'s policy is that only certain documentation from I.N.S. which explicitly indicates that the child has permission to remain in the U.S. will qualify the child for state educational funds. [Deposition of Alton Bowen, T.E.A. Deputy Commissioner (hereinafter "Bowen Deposition") at 45, 93-94]. School districts can receive state funds for alien students in possession of an Alien Arrival-Departure Card (Form I-94), an Alien Receipt of Registration Card (Form I-151), or a Silva letter.[2/] The requirement that children with a Silva letter be admitted into school is a statewide requirement occasioned by the Texas Education Agency order in Martinez v. Austin Independent School District, Docket No. 77-R87 (State Commissioner of Education, October 24, 1977).

Interpreter Releases, Vol. 56, No. 21 (May 31, 1979) at 269-270 (a true and correct copy of this report is hereto attached as Exhibit "E" and is incorporated herein by this reference)]. Furthermore, the Legislative Counsel for the State of California recently ruled that the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and the California Constitution require public schools in California to provide tuition-free elementary and high school education to "illegal aliens." [A true and correct copy of this ruling is attached hereto as Exhibit "F" and is incorporated by this reference].

[2] Issued under authority of Silva v. Levi, Case No. 76C 4268, (N.D. Ill., 1978), an action enjoining the I.N.S. from deporting people whom, but for an I.N.S. error in visa allocation, would have already achieved permanent resident status.]

In recent hearings before the Texas Advisory Committee to the United States Commission on Civil Rights, where school superintendents and officials from the Texas Education Agency testified, the testimony indicated confusion as to the meaning of the state law, varying interpretations of the law by different school districts, and failure of T.E.A. to take any steps to insure uniformity of application of §21.031. [Hearings on Immigration, Texas Advisory Committee to the U.S. Commission on Civil Rights, September 12, 13, and 14, 1978 (San Antonio, Texas) (hereinafter referred to "Commission on Civil Rights Transcript") (the Commission will shortly be issuing a report on the §21.031 school policy and its manner of implementation)]. For instance, the El Paso School District testified that they follow the policy

> that if the parents are not U.S. citizens or legal aliens that their children may not attend the [public] schools, even though the children may be (United States) citizens. [Id. at 199].

The El Paso School District justified this interpretation by stating:

> I can only tell you what our lawyers tell us and that is that the child does not have the status only the parents do. So "all persons" [as used in §21.031] refers to the parent and not to the child. [Id. at 203].

Other school districts look to the immigration status of the child and not the parent. [Id. at 233]. When T.E.A. was asked whether they have any procedures to standardize the screening practice, T.E.A. stated:

> This particular one [practice] is not standardized - I should not say not necessarily standardized - but there is nothing in writing that would interpret the law. [Id. at 267].

T.E.A. is currently enjoined from applying the alienage provisions of §21.031 in Tyler, Texas as a result of a District Court ruling that held §21.031 in violation of the U.S. Constitution. [Doe v. Plyler, 458 F.Supp. 569 (E.D. Tex. 1978)].

III.

Summary of Facts as to Named Plaintiffs' Rejection from Tuition Free Education

A. Veronica Palacios

Plaintiff Veronica Palacios (age 6) was born in Mexico. Her mother, Marta Palacios Garza, was also born in Mexico. Her stepfather, Gaspar Garza, was born in Kingsville, Texas. Mrs. Garza first came to live in the United States in March 1967 [Deposition of Marta Garza at 8] where she lived in California and Texas. [*Id.* at 13-14]. Mr. Garza works in Houston and pays taxes to support the H.I.S.D. [*See*, Deposition of Gaspar Garza at 5-7.] Mr. Garza filed a petition with the I.N.S. to grant his wife and stepchild permanent resident immigrant status on August 31, 1978. The petition was approved by the I.N.S. on December 28, 1978. [A true and correct copy of this approval letter is hereto attached as Exhibit "G" and incorporated by this reference]. The plaintiff has applied for an immigrant visa to be issued by the U.S. Consulate in Monterrey, Mexico. [Deposition of Gaspar Garza at 13]. On September 2, 1978, Mr. and Mrs. Garza attempted to enroll the plaintiff child at Eugene Fields Elementary School. [*Id.* at 16]. Mr. Garza presented to the secretary-registrar the birth certificate of Veronica Palacios, his stepdaughter, which indicated that Veronica was born in Mexico. Mr. Garza stated that the registrar did not know the rules about admitting foreign-born children and Mr. Garza was referred to the principal, Ms. Linell Saye. [*Ibid.*]. Mr. Garza stated the following about the principal, Ms. Saye:

> She was confused, too. She did not know [whether to admit my step-daughter] because she said this was the first time anything had happened during her tenure as a principal in that particular school. [*Ibid.*].

The principal referred Mr. Garza to the H.I.S.D. Administrative Building. Mr. Garza went that same day and spoke with a Mr. Yarborough at the H.I.S.D. Administrative Building. [*Id.* at 17]. Mr. Garza presented Mr. Yarborough the birth certificate of Veronica Palacios and was told that he would have to pay

$137 a month tuition for his stepdaughter. [Ibid.]. Mr. Garza has a job which pays $3 an hour for forty-two hours a week. [Id. at 6]. He was not able to enroll Veronica Palacios in public school at that time. Mr. Garza tried a second time to enroll his stepdaughter at Eugene Fields Elementary when a new principal, Ms. Nikirk, was appointed. Ms. Nikirk told him that she could enroll Veronica Palacios at a tuition rate of $68.50 a month. [Id. at 20]. Mr. Garza made one payment and his stepdaughter attended 1-1/2 months of public school. Veronica Palacios was not allowed to attend any further public school because her parents were not able to continue paying this tuition. [Ib. at 22]. The plaintiff child speaks English and did not participate in the free lunch program. [Id. at 20 and 21]. The plaintiff child was not in a bilingual program even though one was offered at the public school she briefly attended. [Id. at 20]. The plaintiff child has a U.S. citizen half-sister who lives in the same household and attends a free public school. [Id. at 21]. The U.S. citizen sister did attend a bilingual program. [Ibid.].

B. The Manzano Children

Plaintiffs, Veronica Manzano (age 12), Maria Guadalupe Manzano (age 14), and Francisco Javier Manzano (age 10) were born in Mexico. Both of their parents were born in Mexico. Mr. Manzano obtained his permanent resident immigrant visa on April 1975. [Deposition of Guadalupe Manzano at 12, 19-20]. Mr. Manzano works in Houston and pays taxes to support H.I.S.D. [Id. at 4-10]. Mr. Manzano filed a petition with the I.N.S. to grant his wife and plaintiff children permanent resident immigrant status. [Deposition of Maria Manzano at 3, 10-12, 18-28]. Plaintiff children also have three U.S. citizen brothers and sisters, two of whom are of school age. [Id. at 67 and 69]. On August 15, 1978, Mrs. Manzano, with the assistance of Dr. Margarita Melville, attempted to enroll the Manzano children at Rusk Elementary School. [Deposition of Mrs. Manzano at 12-15, 43-44, 51-52, 84-93]. Mrs. Manzano presented to the principal and to the official at the H.I.S.D. Administrative Offices, a multitude of immigration documents to prove that the children were in the process of obtaining immigrant visas and had never been adjudicated to be deportable aliens by the Immigration Service. [*Ibid*.]. The children were nonetheless refused admission. They were not told that they could pay a tuition. [*Id*. at 120]. Mrs. Manzano tried again in October 1978 to enroll her children at another public school, Lantrip Elementary. [*Id*. at 85]. Again, she presented a multitude of immigration documents to prove that her children were in the process of obtaining an immigrant visa, but again they were refused tuition-free admission. [*Id*., at 84-93, 101-105, 108-110, 114-118, 119, 123-127]. The parents made inquiries into private schools, but found tuition too expensive. [*Id*., at 44-47, 52]. The plaintiff children did not attend any school the entire year of 1978-79. [Deposition of Mrs. Manzano at 93].

IV.

Plaintiffs Show a Likelihood of Prevailing at the Trial on the Merits

A. Federal Constitutional Protections Apply to All Aliens Within the Territorial Jurisdiction of the United States

1. Fifth Amendment

As early as 1895, the Supreme Court ruled that the Fifth Amendment Due Process Clause is universal in its application to all persons within the territorial jurisdiction of the United States. [*Wong Wing v. U.S.*, 163 U.S. 228, 238, 241, 242-43 (1896) (aliens were admittedly unlawfully in the U.S.)]. This protection vests upon an alien's presence in the U.S. An alien who has not effected a physical entry into the United States is faced with exclusionary hearings, while an alien who has effected a physical entry is faced with expulsion hearings. [Gordon & Rosenfield, *Immigration Law and Procedure*, §3.18 (Matthew-Bender, 1977)]. "[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality." [Lang May Ma v. Barber, 357 U.S. 185, 187 (1958).]. Aliens who have physically entered the United States are entitled to a plethora of Fifth Amendment due process rights in deportation proceedings aimed at determining the legality of their presence in the United States. [E.g., 8 U.S.C. §1252(b) (alien's right to assistance of counsel and alien's right to confront and cross-examine adverse testimony)]. Until a final determination of deportability is reached, an alien retains the right to remain in the United States. [See, 8 C.F.R. §3.6; Heikkila v. Barber, 345 U.S. 229 (1953); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); 8 U.S.C. §1105a(a)(3).].

The Supreme Court in Mathews v. Diaz, 426 U.S. 67 (1976), stated:

> The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these [aliens] from deprivation of life, liberty, or property without due process of law (citations omitted) even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. [Id. at 77, citing Wong Yang Sung v. McGrath, 339 U.S. 33 (1960; Wong Wing v. U.S., 163 U.S. 228 (1896) (emphasis added)].

Thus, all aliens, regardless of their manner of physical entry, gain Fifth Amendment constitutional protections because of their physical presence within the territorial jurisdiction of the United States. Supreme Court Justice Field, in Wong Wing, supra, stated that "the contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the [Constitution] was heard with pain on the argument at the bar." [Id. at 242-43]. He reiterated that the term "person", used in the Fifth Amendment, is broad enough to include all persons within the jurisdiction of the republic. [Id. at 242].

2. Fourteenth Amendment

The applicability of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to all aliens stems, like the Fifth Amendment's Due Process Clause, from the territorial nature of those rights. The Fourteenth Amendment's applicability is not precluded by the manner in which the alien effected entry into the United States. In an early ruling, the Supreme Court recognized that even those aliens who are transitorily within the country are bound by its basic laws and in turn protected by them. [Carlisle v. U.S., 16 Wall. 147 (1872)]. In Carlisle, supra, the court considered the issue whether certain British aliens who had aided the confederate state during the Civil War were precluded from benefitting from the proclamation of pardon and amnesty made by the President on the 25th of December, 1908 [Id. at 151]. Holding that the aliens were not precluded from this protection, the court stated:

> The rights of sovereignty, says Wildman, in his Institute on International Law, p. 40, "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection." [Id., at 154].

[See also, Johnson v. Ersentraser, 339 U.S. 763, 771 (1950) ("But in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the judiciary power to act."). In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court specifically ruled that aliens are protected by the Equal Protection Clause of the Fourteenth Amendment. The court emphasized the territorial nature of the word "person":

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the law is a pledge of the protection of equal laws. [*Id.* at 369; (emphasis added)].

Although the Petitioners in *Yick Wo* apparently were not deportable, the Court did not distinguish between deportable and nondeportable aliens. The Court reemphasized that

> [the] equal protection of the laws ... is secured to the petitioners, *as to all other persons*, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. [*Id.* at 373; (emphasis added)].

Neither the language nor the logic of the Fourteenth Amendment support the proposition that its guarantee of equal protection and due process of the laws does not extend to aliens whose immigrant status is unsettled [For a discussion of the term "unsettled", *see* infra at 36-38]. The United States Supreme Court has indicated that all aliens are entitled to the protection of the due process clause. [*See*, *supra*, pg. 9-10]. The Fourteenth Amendment due process clause, by its own terms, applies to "any person ...". The equal protection clause, by its own terms, applies to "any person within its jurisdiction ...". Judge Friendly in *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975), "readily agree[d] that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States [citations omitted] and even to aliens whose presence here is illegal." [*Accord*, *Holley v. Lavine*, 529 F.2d 1294 (2d Cir.), *cert*. *denied*, 426 U.S. 954 (1976); *United States v. Barbera*, 514 F.2d 924 n.3 (2d Cir. 1975)].[3] Defendant,

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[3] [*See also*, *U.S. v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) and *U.S. v. Cadena*, 595 F.2d 1252, 1262 (5th Cir. 1978), for Fifth Circuit support of the notion that the Fourth Amendment protections are territorial in nature as they apply to aliens].

State of Texas, through its Attorney General, has previously conceded that:

> [T]he existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. section 1981 and the Fourteenth Amendment to the United States Constitution. [Citing, *Bolanos v. Kiley*, supra; *Williams v. Williams*, 328 F.Supp. 1380 (D.V.I. 1971); *Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576 (N.D.Ill. 1936); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex.Civ.App. 1972) (a true and correct copy of this opinion is hereto attached as Exhibit " " and incorporated by this reference].

B. Federal Civil Rights Statutes Protect All Aliens Within Territorial Jurisdiction of the United States

1. Applicability of 42 U.S.C. §1981

42 U.S.C. §1981 in pertinent part states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory... to the full and equal benefit of all laws...for the security of persons and property as is enjoyed by white citizens ...

In *Guerra v. Manchester Terminal Corporation*, 350 F. Supp. 529 (S.D. Tex. 1972) (§1981 suit challenging constitutionality of a local union decision that Mexican nationals maintaining their families in Mexico would be given last preference for a job), the court thoroughly reviewed the legislative history of §1981 to determine whether it protected non-citizens. [*Id*. at 533-38] Throughout this analysis of legislative history, constant reference is made to the fact that aliens within the United States *were* to be included within the ambit of §1981. [*Ibid*.] No distinction was ever made in the legislative history of §1981 between different classes of aliens. An alien's unlawful entry into the United States does not disenfranchise that alien from civil rights protection. This position is supported by numerous decisions issued by courts throughout the nation. [*See* e.g. *Roberto v. Hartford Fire Insurance Co.*, 177 F.2d 811 (7th Cir. 1949); *Arteaga v. Allen*, 99 F.2d 509 (5th Cir. 1938); *Lopez v. White Plains Housing Authority*, 355 F.Supp. 1016 (S.D.N.Y. 1972); *Martinez v. Fox Valley Bus Lines*, *supra*; *See also*

Arteaga v. Literski, 265 N.W.2d 148 (Wis. 1978); Nizamuddowlah v. Bengal Cabaret, Inc., 92 Misc.2d 220, 339 N.Y.S.2d 854 (N.Y.Sup. Ct. 1977); Ayala v. California Unemployment Insurance Appeals Board, 54 Cal.App. 3d 676, 126 Cal.Rptr. 210 (Cal.Ct.App. 1976)].

A Section 1981 suit is additionally appropriate here because that provision protects against arbitrary and discriminatory exclusions from the public schools. [Gonzales v. Sheehy, 96 F.Supp. 1004 (D.Az. 1951) (challenge by Mexican-American children that segregation policies by public elementary school authorities operated to deny petitioners access to equal accommodation and facilities as enjoyed by Anglo citizens); Blocker v. Board of Education of Manhasset, New York, 226 F.Supp. 208 (E.D.N.Y. 1964) (§1981 challenge by Black students for refusal to be admitted to non-segregated public schools); Sealy v. Dept. of Public Instruction of Penn., 159 F.Supp. 561 (E.D.Pnn. 1957), aff'd 252 F.2d 898 (3rd Cir. 1957), cert. denied, 356 U.S. 975 (1958) (§1981 challenge that location of new public school was racially motivated)].

2. Applicability of 42 U.S.C. §1983

42 U.S.C. §1983 in pertinent part provides that:

> Every person who, under color of any Statute...of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights... secured by the Constitution and laws, shall be liable to the party injured...

In a recent action challenging the constitutionality of §21.031, the plaintiffs successfully relied upon §1983. [Doe v. Plyler, 458 F.Supp. 569 (E.D. Tex. 1978)]. The court ruled §21.031 unconstitutional as applied in Tyler, Texas [Ibid.]. In Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975), an alien filed suit to enjoin his deportation. The court ruled against the alien, but it did state:

> We can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States (citations ommitted), and even to aliens whose presence here is illegal. (citations omitted) We can likewise agree that the familiar combina-

> tion of 42 U.S.C. 1983 and 28 U.S.C. 1343(3) affords such an alien access to the federal courts to assert a claim of violation of those clauses by a state officer. [Id. 1025-26].

[*See also*, *Holley v. Levine*, 529 F.2d 1294, 1296 (2nd Cir. 1975), cert. den. 426 U.S. 954 (1976); *Williams v. Williams*, 328 F.Supp. 1380, 1383 D.V.I. 1971)].

C. The Appropriate Level of Judicial Scrutiny Should Be Heightened If Not Strict

The fairness of a legislative classification in a challenged statute and policy is primarily measured within the framework of the well established two-tiered test. If the challenged law threatens a fundamental right or creates a suspect classification, the court must subject the state's interests served by the law to strict scrutiny. In such a case, the law will be upheld only if it is precisely tailored to further a compelling government interest. [*Shapiro v. Thompson*, 394 U.S. 618, 638 (1969)]. Absent a fundamental right or suspect classification, a law need only be supported by a rational basis. [*San Antonio School District v. Rodriguez*, 411 U.S. 1, 40 (1973)]. Commentators have suggested the emergence of a sliding scale or heightened scrutiny [*see e.g.*, Gunther, *The Supreme Court 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harvard Law Review 1 (1972)], and various Supreme Court decisions indicate some flexibility in the two-tiered test.[4]

1. The plaintiffs in this case constitute a suspect classification

The Supreme Court has ruled that classifications by a State that are based on alienage are "inherently suspect and subject to

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[4] [*See e.g.*, *Zablocki v. Redhail*, _______ U.S. _______; 98 S.Ct. 673 (1978) (statute burdening the right to marry must be "closely tailored" to its purpose); *Califano v. Jobst*, _______ U.S. _______; 98 S.Ct. 95 (1977) (statute concerning marriage and social benefits must be based on "tradition and common experience" and presumption in statute must be a "reliable indicator" of true facts); *Mathews v. Lucas*, 427 U.S. 495 (1976) (statute concerning

(Footnote #4 con't. on page 16)

close judicial scrutiny." [Graham v. Richardson, 403 U.S. 365, 372 (1971); Examining Board v. Flores de Otero, 426 U.S. 572, 601-202 (1976); In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413, U.S. 634 (1973)]. As the Court stated in Graham:

> Aliens as a class are a prime example of a 'discrete and insular' minority [see United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938)] for whom such judicial solicitude is appropriate. [Id. at 372].

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973), the Supreme Court set forth the following standard for the "traditional indicia of suspectness":

> [T]he class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritorial political process. [Ibid.]

Section 21.031 of the Texas Education Code does not distinguish between citizens and the entire heterogeneous group of aliens in the state; rather, it discriminates only between citizens and "legally admitted' aliens on the one hand, and all other aliens on the other. The Supreme Court in Nyquist v. Maucelet, 432 U.S. 1 (1977), rejected an argument that because a statute distinguished within the entire class of aliens, it did not warrant more rigid judicial scrutiny:

> The important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class. [Id. at 9 (citations omitted)]

Alien children excluded from public school attendance are politically powerless. They are not entitled to vote and frequently

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illegitimate children must be based on "reasonably empirical judgements"); Craig v. Boren, 429 U.S. 190 (1976) (statute discriminating against males must be "substantially related" to its purpose); Roe v. Wade, 410 U.S. 113 (1973) (abortion statute must be "narrowly drawn"); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute limiting access to contraceptives must bear a "fair and substantial relationship" to its purpose); Reed v. Reed, 404 U.S. 71 (1971) (statute discrimination against females must bear a "fair and substantial" relationship to

(Footnote #4 con't. on page 17)

their parents are also excluded from participation in electoral politics. [*Sugarman v. Dougall*, 413 U.S. 634, 646-48 (1973)]. Consequently, they are entirely dependent on others to protect their social and political interests. Undocumented aliens[5] have historically been the target of purposeful legal, economic, and social discrimination and exploitation. [*See*, *Undocumented Aliens and the Constitution*, 5 HASTINGS CONSTITUTIONAL LAW QUARTERLY 461, 468 (Winter 1978)]. Employers, landlords and merchants are all able to exploit them, knowing that the undocumented alien can be turned over to federal officials for possible deportation if he challenges their authority. [*Ibid.*]. Undocumented aliens are generally employed in the lowest paying jobs, often at a wage below the legally required minimum wage. [*Ibid.*]. Undocumented aliens in general share with other ethnic and racial minorities physical, cultural and language characteristics that set them apart from the Anglo majority and make them identifiable as part of a distinct and insular minority. [*See*, *Keyes v. School District*, 413 U.S. 189, 197-98 (1973)].

Defendants' statute [Section 21.031] and policy implemented thereunder impacts on a defined group of alien children. The classification created thereby is suspect because it solely discriminates against a class of alien children saddled with such disabilities and relegated to such a position of political powerlessness as to command protection from the majoritorian political process. The alien status of plaintiff children and the class they seek to represent is a status for which those children are not responsible. They were brought here by their parents. The denial of a tuition-free education, to a discrete group of alien children for their condition, requires strict scrutiny.

An additional indication that strict scrutiny or some level of heightened scrutiny may be appropriate arises because the chal-

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to its purpose); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (statute restricting international right to travel cannot "sweep unnecessarily broadly" and must be "narrowly" drawn)].

[5] The class of children represented herein are not properly defined as "undocumented" aliens. Some of them, such as the plaintiff Manzano children, may in fact possess INS documentation but it is not of the type required for tuition-free enrollment in the public schools.

lenged policy of charging a tuition fee to resident alien children constitutes discrimination on the basis of wealth. [*See*, *Doe v. Plyer*, *supra*, 458 F.Supp. at 581]. Relatively wealthy alien children are able to attend school despite the E.I.S.D. tuition policy, while poor alien children are totally excluded from receiving an education. In *Rodriguez*, *supra*, the Court discussed prior cases in which the class discriminated against "shared two distinguishing characteristics: because of their impecunity they were completaly unable to pay for some desired benefit, and as a consequance, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." [411 U.S. at 20.]. Such absolute deprivations imposed only on poor people have long been considered deserving of judicial solicitude (*See*, *e.g.*, Griffin *v. Illinois*, 351 U.S. 12 (1958)], and the *Rodriguez* Court declared that the existence of "a clearly defined class of 'poor' people" would "present a far more compelling set of circumstances for judicial assistance ..." [411 U.S. at 24 n.60.]. Similarly, in *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), the Court observed that a state "could not, for example, reduce expenditures for education by barring indigent children from its schools."

For all of the above reasons this Court should find that the classification created by Section 21.031 is suspect and should be tested utilizing close scrutiny by this Court. Cases involving a suspect classification are carefully analyzed as to the interests which the government claims to be protecting, the necessity for the means adopted to advance the interests, and the importance of the liberty disadvantaged by the classification.

2. The denial of tuition-free public education to plaintiffs constitutes a violation of a fundamental right.

Heightened judicial scrutiny is additionally justified in this case because Section 21.031 burdens the exercise of a fundamental right. Although the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), found no fundamental right in a relative level of education, it explicitly reserved the question of whether an absolute deprivation of education violates a fundamental right. [Id., at 36-37] The Court noted:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people — definable in terms of their inability to pay the prescribed sum — who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

This is precisely the situation in this case - a class of poor, resident alien children, unable to pay tuition set by H.I.S.D., is absolutely excluded from receiving a public education. The Supreme Court, in justifying a rational basis standard of inquiry in Rodriguez stated:

> Every step leading to the establishment of the system Texas utilizes today...was implemented in an effort to extend public education and to improve its quality... The thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the states efforts and to the rights reserved to the states under the Constitution. [Id., at 39]

Here, the exclusionary amendment to §21.031 was passed after the State Attorney General ruled that undocumented aliens were entitled under state and federal constitutional law to tuition-free public education. [Texas Attorney General's Opinion No. H-586 (Opinion Letter, April 18, 1975) See Exhibit "C"]. The thrust of the amendment was to limit and, in almost all instances, absolutely deny education to a class of children. Nothing in Rodriguez detracts from the recognition by the Supreme Court that "education is perhaps the most important function of state and local government." [Brown v. Board of Education, 347 U.S. 483, 493 (1954)] The court in Plyler found that a state may not "reduce expenditures for education by barring indigent children from its schools." [Doe v. Plyler, supra, 458 F.Supp. at 581-82, citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969)]. As recognized by the court in Fialkowski v. Sharp, 405 F.Supp 946 (E.D. Pa. 1975), in addressing the constitutionality of an absolute deprivation of education to retarded children: "It would thus appear not inconsistent with Rodriguez to hold that there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right at a particular level of education." [*Id.* at 958].

Recent studies indicate that undocumented aliens who emigrate to the United States with their families tend to remain permanently in the United States regardless of whether they eventually become documented. [*Doe, supra* at 577-78]. Thus, the absolute denial of education compounds the reasons that undocumented aliens are presently evolving into a permanent "underclass."

While the Supreme Court has never ruled that it is necessary to have *both* a suspect class and a fundamental interest in order to invoke heightened scrutiny [*Graham v. Richardson*, 403 U.S. 365, 476 (1972)], the instant case is uniquely appropriate for such scrutiny given the confluence of a suspect class and a fundamental interest.

Strict scrutiny requires a state to show that the classification is "necessary to promote a compelling government interest." [*Shapiro v. Thompson*, *supra*, 394 U.S. at 634]. In *Rodriguez* [*supra* at 16-17], the Court articulated the elements of strict scrutiny:

> [A]s previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification", that the State must demonstrate that its educational system has been structured with "precision", and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives...[*Ibid.*]

Alternatively, heightened scrutiny would require that defendants establish a "fair and substantial" relationship between the purpose of Section 21.031 and what the statute achieves in its implementation. [*Reed v. Reed*, *supra*, 404 U.S. at 76.]

D. The State and School District Policies Fail To Achieve Stated Purposes

1. The challenged policy fails to save money since defendants cannot substantiate their economic loss if plaintiffs were allowed to enroll.

(a) Defendants cannot substantiate their economic injury since they have no basis for estimating the number of children excluded by their policy.

Defendants have no basis for substantiating the number of alien children excluded by their policy. The T.E.A. has no monitoring system of the number of children excluded by §21.031. Deputy Commissioner of Education Bowen has testified that they have no reports which indicate the number of students specifically excluded because of implementation of Section 21.031. [Bowen Deposition at 63]. The Deputy Commissioner stated that T.E.A. has never considered requesting reports from individual school boards, superintendents or principals concerning the number of students that have been excluded due to the alien provision of §21.031 [Id. at 64] The Deputy Commissioner testified that they have never made an effort to determine the number of deportable children in the State of Texas for any particular year. [Id. at 87] He also testified that there is no statewide policy which would require school districts to maintain a record of the number of students that have been excluded under the alien provisions of §21.031. [Id. at 65]. Indeed, he stated that T.E.A. has no need for such information. [Ibid.]. Deputy Commissioner Bowen was asked in deposition about a November 1977 attempt by the State Attorney General's office to survey school superintendents from across the state to determine the number of so-called "illegal aliens" and the impact upon the school districts. Counsel for defendant stated:

> We didn't get much response...we were very notably unsuccessful in compiling that information. [Bowen Deposition at 75-76].

Finally, the Deputy Commissioner stated that T.E.A. does not maintain reports on the number of students that are tuition-paying because of their ineligibility to enroll in the public schools, tuition-free, under Section 21.031. [Id. at 66].

The H.I.S.D. likewise has no basis upon which to speculate on the number of foreign-born children excluded by §21.031. The superintendent has testified that he has not seen a report listing the number of foreign-born children excluded by their policy which implements §21.031. [Deposition of Billy Reagan at 34, 40, and 43] He also stated that no records are maintained on the number of tuition-paying students admitted into school, but who otherwise would be excluded under the policy implementing §21.031. [Id. at 38] He also did not find that type of information necessary. [Id. at 38 and 39] Mr. Lon Wheeler, the Director of Attendance and head of the Pupil Transfer Department which renders final decisions under §21.031, stated that he keeps no records of the number of children excluded by the school district's policy implementing §21.031. [Deposition of Lon Wheeler at 16] He further stated that his five (5) subordinate interviewers are not required, nor do they maintain, any records which would provide the number of students excluded by §21.031. [Id. at 9] Indeed, Mr. Wheeler stated that he did not think anyone in this school district knew the number of students excluded under §21.031. [Id. at 24]

However, defendant H.I.S.D. did respond to the November 1977 attempt by the State Attorney General's office to survey school superintendents to find out the number of so-called "illegal aliens" and the impact upon the school districts. [A true and correct copy of this Attorney General questionnaire is attached hereto as Exhibit "H" and incorporated by this reference]. The Houston school officials claimed that about 100 "illegal alien" children attempted to enroll in H.I.S.D. prior to 1975 and were denied admission. [See, Answer number 3 of the H.I.S.D. response. A true and correct copy of this H.I.S.D. document is attached hereto as Exhibit "I" and incorporated by this reference]. H.I.S.D. further responded that about 300 ineligible alien families attempted enrollment in 1975-76 [Id., at Answer number 5(c)], that about 300 ineligible alien families attempted enrollment in 1976-77 [Id., at Answer number 5(b)], and that about 500 ineligible alien families attempted enrollment in 1977-78. [Id. at Answer number 5(a)]. H.I.S.D.

further stated that there were no ineligible alien students paying tuition in 1975-76, 1976-77 and 1977-78. [Id., at Answers 4(c) - (e)]. It is uncertain as to how H.I.S.D. officials reached these estimates inasmuch as they maintain no records on the number of alien children excluded Section 21.031.

The Houston I.N.S. District Director, Paul B. O'Neill, has stated in writing that I.N.S. statisticians do not make predictions on the number of undocumented aliens, as any such prediction cannot be supported by fact. [A true and correct copy of this writing is hereto attached as Exhibit "J" and incorporated herein by this reference]. This position was reiterated by District Director O'Neill in oral deposition. [O'Neill Deposition at 38-40]. In response to plaintiffs' question as to how many alien children in the Houston District [which covers thirty counties (O'Neill Deposition at 4)], have been apprehended, placed on docket control, given voluntary departure or deportation, he stated:

> As a result of your request in the subpoena, I have spent considerable effort and time, and at no small expense, attempted to get some figures for you that would indicate how many persons of certain age groups are under docket control. And what I have arrived at is with children that are between the ages of — well, who were born between the dates of 1961 and December 31st of 1972, we have a total of 911 children under docket control that falls within that category. And those children who were born after January of 1973 through the present time, we have a total of 241. That makes a total of 1,152 children. [O'Neill Deposition at 40].

In conclusion, neither the State of Texas nor H.I.S.D. maintains statistics to establish the number of children affected by Section 21.031. And, the Immigration Service does not make estimates of the number of children found to be deportable in the State of Texas. Therefore, defendants cannot substantiate what, if anything, they can gain through implementation of Section 21.031. The relationship between the enrollment of alien children in the Texas public schools and a negative educational impact on U. S. citizen and legally admitted children is therefore without evidentiary foundation. [Cf. Jiminez v. Weinberger, 417 U.S. 628, 633 (1974); Memorial Hospital

v. Maricopa County, 415 U.S. 250, 267 (1974); Shapiro v. Thompson, supra, 394 U.S. at 631; Craig v. Boren, supra, 429 U.S. at 200-04]. The presumption that Section 21.031 works to the betterment of U.S. citizen and lawfully admitted children is not based on "reasonable empirical judgments." [Mathews v. Lucas, supra, 427 U.S. at 510]. Defendants certainly cannot establish a compelling government interest in enacting Section 21.031. Nor can they show that implementation of the statute bears a fair and substantial relationship to its intended purpose. Under either test the statute therefore fails to overcome the Fourteenth Amendment challenge brought herein.

(b) Defendants cannot substantiate their economic injury since they have incorrectly assessed the cost of educating excluded children.

Defendant H.I.S.D. has projected the cost of educating an excluded child at $1,740.41 per child per year. [See, H.I.S.D. Administrative Services Reports for September 21, 1977 and March 25, 1976. True and correct copies of these reports are thereto attached as Exhibit "X" and incorporated herein by this reference]. This figure is arrived at by taking the average revenue per pupil per year ($1,288) and adding the cost of special educational needs based on characteristics imputed to the children by defendant H.I.S.D. This means of calculating the cost to the school district for educating excluded alien children grossly exaggerates the loss to the district attributable to compliance with §21.031, Texas Education Code.

Section 21.031 indicates that children who are not "citizens or legally admitted aliens" cannot participate in the Available School Fund. Consequently, school districts cannot claim the $130 yearly contribution per student based on average daily attendance records (Per Capita Apportionment) for students not within the eligible category. [Deposition of Alton Bowen at 84] Rather than losing the average revenue per student of $1,288, the defendant school district has an actual loss of $130 per student per year.

The H.I.S.D. also claims that it could be forced to spend an additional $452.41 per student for each one eligible to participate in federal assistance programs. (Title I Free Clothing, U.S.D.A. Free Lunch & Breakfast, and Bilingual Programs). [See Exhibit "X"]. However, the revenues for this program do not come from the Available School Fund and would not be affected by Section 21.031. Furthermore, none of these federal monies are conditioned on the alienage of the child. [Deposition of Alton Bowen at 87]. Therefore, the E.I.S.D. would not make any expenditure under any of these programs for which it does not receive compensation from the federal government. As is the case with the other claimed expenses, inclusion of the cost of participation in federally funded programs further exaggerates the cost of educating certain alien children to alarming proportions without contributing to a realistic projection of actual added expense.

The E.I.S.D. also claims that it could be forced to spend local funds for the education of ineligible students. [See, Exhibit "X"]. A federal court addressed the issue of local school district costs in educating ineligible alien students and found that:

> The evidence discloses that the exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level; but the savings are unpredictable both in amount and distribution. Approximately twenty-five percent of education expenditures in Texas are in fixed costs, i.e., administrative, maintenance, and operational costs, which are not diminished by moderate declines in student enrollment. The largest item in variable costs is teacher salaries, which require substantial and concentrated decline in enrollment before any economies result. Generally, a decrease of twenty to thirty students at one time, in a given grade and in a given school is required in order to justify the dismissal of one teacher. Even then, systems of tenure and seniority operate to minimize savings, since the first teachers to be dismissed are ordinarily those with the lowest salaries. Hence, the proportional cost (operating budget divided by enrollment) is a very inaccurate indicator of the incremental expense of educating additional students. [Doe v. Plyler, supra at 576-77].

Finally, even if defendants could prove some savings in expenditures by excluding plaintiff children and the class they seek to represent from a tuition-free education, it is not sufficient justification that a law saves money. [See, Shapiro v. Thompson, supra, 394 U.S. at 633; United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973)].

2. The challenged policy fails to achieve its stated purpose since it falsely assumes that it is excluding children who are not bona fide residents of the state or school district.

Another purpose of this policy has been to limit the benefits of its tuition-free education to bona fide residents of the state. Defendant H.I.S.D. has stated this rationale as follows:

> In the case now before this court, those unlawfully in the country cannot be *bona fide* residents of the state or of the United States. The state's special interest in educating those lawfully within the state, both citizens and legal aliens, requires that the state be given the right to expend its limited educational resources in a way that will most benefit those entitled to it. [H.I.S.D. Amicus Curiae Brief, *Doe v. Plyler*, In The United States Court Of Appeals For The Fifth Circuit, No. 78-3311 (February 1979) at 26].

There are several major problems with this rationale. First, the named plaintiffs in the present case have not been found to be unlawfully present in the United States by an Immigration Judge in proceedings under the Immigration & Nationality Act. [*See*, *infra*, at 36-38]. Thus, we take exception to H.I.S.D.'s statement that "illegal aliens in the Houston area have filed four suits in the United States District Court for the Southern District of Texas." [H.I.S.D. Amicus Curiae Brief, *supra*, at 5]. The exclusion of the plaintiff alien children from tuition-free public education *does not* make them "illegal aliens" regardless of defendants' summary conclusions. Plaintiffs and their class members are entitled to remain in the United States unless and until they are found to be here in violation of law by an Immigration Judge. [*See*, 8 U.S.C. §1105(a)(3); 8 C.F.R. §3.6; *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955)]. Defendants have no authority to brand plaintiffs and their class members as non-residents of this State or the United States when such a label is invoked based solely on a *pre-determination* of their alien status.

It should first be made clear that the exclusion of alien students due to §21.031 and H.I.S.D. policy is not an issue of whether the excluded alien child is an eligible "resident" of the school district as required by §21.031(d). The exclusion of the plaintiff alien children is due to the operation of §21.031(a) - (c) which restricts certain state funding to only U. S. citizens and "legally admitted aliens." The question of residency for public school attendance purposes is an entirely separate issue. In a letter dated April 30, 1975 [Reagan Deposition at Exhibit number 6] Commissioner of Education, M. L. Brockette stated:

> Regardless of whether alien children are "legally" or "illegally" within the United States, a public school district of this State is entitled to count for Foundation School Program benefit purposes the average daily attendance (ADA) earned by alien children (as other children eligible to attend) *who are resident(s)* in the district with parent, guardian or the person having lawful control. [Emphasis added.]

In another document from T.E.A. dated October 30, 1975 [Reagan Deposition at Exhibit number 7], Deputy Commissioner Alton Bowen stated, after §21.031 was amended:

> Administrators must keep in mind that *there have been no changes in the law related to residence requirements*, including the residence of lawfully admitted aliens. Pupils must be a resident of the district of attendance or be officially transferred before attendance may be shown as eligible. [Emphasis added.] .

Defendant therefore correctly concedes that the issue of state or school district residency is separate and apart from the issue of a child's immigration status under the Texas Education Code. Plaintiffs will now establish that defendants were correct in reaching this conclusion.

(a) Under federal interpretation of "residency", plaintiffs have established themselves as bona fide residents.

The status of persons in this country as citizens or aliens is controlled entirely by the Constitution of the United States and the acts of Congress passed in pursuance thereof. [8 U.S.C. §1101 *et seq.*]. The term "alien" is defined by federal statute as "any person not a citizen or national of the United States." [8 U.S.C. §1101(a) (3)]. Under the federal immigration laws, all aliens, except certain defined "classes of nonimmigrant aliens", are defined as "immigrants." [8 U.S.C. §1101(a) (15).] Under the

Immigration Act, the term "residence" means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."

Under the Immigration Act, the term "permanent" means "a relationship of continuing or lasting nature...[and] a relationship may be permanent even though it is one that may be dissolved at the instance either of the United States or of the individual, in accordance with law." [8 U.S.C. §1101(a) (31)]. Therefore, under federal law, a person can qualify as a permanent resident entirely aside from the lawfulness of their entry into the United States. A person's residence may of course be terminated at some later date "at the instance...of the United States...in accordance with law." [That is, a due process hearing before an Immigration Judge.]

It is therefore clear that under federal immigration laws, plaintiffs would be considered to have permanent residence in the United States. [See, 8 U.S.C. §§1101(a) (31) and (33)]. Plaintiffs will now establish that they also qualify as residents for purposes of the Texas Education Code.

(b) Under the Texas Education Code plaintiffs and their class members qualify as residents for purposes of enrollment in the Public Schools.

Plaintiff Veronica Palacios has a U. S. citizen stepfather that has always lived in the U. S. [supra at 7] Plaintiff's mother has resided in the U. S. since 1967 [Ibid.] Indeed, plaintiff's mother, even though she has an unsettled immigration status, has stated under oath that she intends to remain here in Houston permanently. [Deposition of Mrs. Garza at 29]. This will be facilitated by the fact that Mr. Garza has filed an immigration petition for Mrs. Garza and Veronica Palacios. [Deposition of Mr. Garza at 13]. A child's domicile is considered that of the parents.

Plaintiffs Manzano children have a father who is a permanent resident immigrant since 1975. [Supra at 8]. Plaintiffs' mother has stated under oath that she intends to remain in Houston permanently even though her immigration status is currently unsettled. [Deposition of Mrs. Manzano at 120]. This will be facilitated by the fact that Mr. Manzano has filed an immigration petition for Mrs. Manzano and her children. [*Supra* at 8].

Defendants have enacted a number of statutes concerning the "residence" of school-age children seeking enrollment in the public schools. Section 21.031(b), aside from the alienage language it contains, directs that "[e]very child...shall be permitted to attend the public free schools *of the district in which he resides...*" [Emphasis added]. Defendants' statutes further provide that:

> The Board of Trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons...*if such person or his parent, guardian or person having lawful control resides within the school district*. [Section 21.031(c), Texas Education Code; emphasis added].

And finally, "[i]n order for a person...to establish a residence for the purpose of attending the public free schools", it must *only* be established that

> his presence in the school district is not for the primary purpose of attending the public free schools. [Section 21.031(d)].

These residency requirements have been interpreted by defendants to mean what they say. Namely, defendants examine whether the claimed residence is bona fide or is merely an ostensible residence for the purpose of attending a particular school. [*See*, Op. Atty. Gen. No. H-63 (1973); *accord* *Brownsville Independent School District v. Gamboa*, 498 S.W.2d 448 (1973); *De Leon v. Harlingen Consol. Indep. School District*, 552 S.W.2d 922 (1977)].

In *Maricopa County*, just as in the case at bar, the government claimed that a waiting period prior to receipt of certain public benefit was a "convenient rule of thumb to determine bona fide residence." [415 U.S. at 267]. The Supreme Court rejected this argument noting that "less drastic means are available and employed" to accomplish this objective. [Ibid]. Here, defendants have available to them various statutes concerning the residence of public school children. These statutes may be and have been utilized to insure that only bona fide residents attend the public schools. As in Maricopa County, "less drastic means", other than the alienage provisions of Section 21.031, are "available and employed" to determine whether a child is a bona fide resident of a particular school district. The requirement of residency and the alienage provisions of Section 21.031 are "distinct and independent prerequisites" for enrollment in the public schools. [Shapiro v. Thompson, supra, 394 U.S. at 636]. Defendants should not now be allowed to muddle-up these distinct requirements.

To the extent that defendants claim that Section 21.031 provides an administratively convenient test for determining bona fide residency, their argument must fail. While every short cut saves funds, the courts are not blinded by such "bright line" rules in determining what is gained and lost in the administration of a whole program by the operation of such cost-saving presumptions. The United States Supreme Court has struck down just such legislative classifications because they allowed no "...middle ground between the extremes of complete exclusion and case-by-case determination..." [Trimble v. Gordon, 430 U.S. 762, 771 (1977); see also Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)]. The alienage provisions of Section 21.031 cannot serve as a conclusive presumption that all alien children affected are not bona fide residents. The Supreme Court has only upheld such classifications when they were "carefully tuned to alternative considerations" and allowed many persons to rebut the presumption. [Mathews v. Lucas, supra, 427 U.S. at 513]. Here, defendants can and do evaluate the bona fide residence of school-age children in light of objective factors and there is no need to resort to the broad brush language of the alien provisions of Section 21.031 [Cf. Memorial Hospital, supra, 415 U.S. at 267-68; Shapiro v. Thompson, supra, 394 U.S. at 636].

Therefore, the state and school are failing to educate residents of the state of Texas who have currently expressed their intent to remain permanently.

E. The Challenged State and School Policies Violate Due Process And Equal Protection Since They Penalize Children For Maintaining A Status Over Which They Have No Control.

Section 21.031 and the challenged school policy focus upon the immigration status of the child seeking tuition-free admission to public school. In the case of all named plaintiffs, one of the parents is either a U. S. citizen or permanent resident immigrant. Plaintiff Veronica Palacios' stepfather and sister are U. S. citizens. [Supra, at 7]. The plaintiff Manzano children have a father who is a permanent resident immigrant. [Supra, at 8].

The fact that each of the plaintiff children presently have an unsettled immigration status is due to no fault of their own. Their parents have gone to the I.N.S. to seek ways to settle their child's immigration status. [Depositions of Gaspar Garza, at 12-1 ;Marta Garza, at 11 ; Guadalupe Manzano, at 13 ; and Maria Manzano at 10-12].

In striking down a school board regulation which permitted the suspension of students for misconduct of their parents, the Fifth Circuit Court of Appeals observed:

> Freedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification. [St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir., 1974)].

The holding in St. Ann relied upon several recent cases decided by the Supreme Court disapproving of classifications based on illegitimacy. In Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), the Supreme Court struck down a Louisiana statute which denied certain illegitimate children the right to equal access to workman's compensation death benefits. Undergirding the Court's decision was a recognition that the child's status was one for which he was not responsible:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationships to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent. [406 U.S. at 174].

The Weber decision built upon Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guarantee and Liability Insurance Co., 390 U.S. 73 (1968), each of which held that statutes which conditioned access to benefits on the basis of a status over which the child had no control were violative of equal protection guarantees. [See also, Robinson v. California, 370 U.S. 660 (1962)].

In conclusion, defendants should not now be allowed to visit injury on plaintiff children and their proposed class members solely because of conduct of their parents over which the children had no control. But for the acts of their parents, plaintiff children and their proposed class members are identically situated with all other school-age children in the State of Texas. Plaintiffs should not be irreparably injured because of conduct over which they had no control.

F. The State and School District Policies Violate Due Process and Equal Protection Because It Is Overly Broad In Its Exclusion of Alien Children Who Are Entitled To Remain In The United States Or Alien Children Who Have Not Had Their Alien Status Adjudicated.

1. The challenged policy is overly broad since it requires a legal admission to the United States and such admission is not necessary for lawful alien status

On its face, §21.031 of the Texas Education Code excludes from the Available School Fund aliens who are not "legally admitted." [See, Exhibit A]. The H.I.S.D. policy excludes from tuition-free public education aliens who are not "legally admitted." [Reagan Deposition at Exhibits 1 - 3]. Mr. Billy Reagan testified during oral deposition as follows:

> Q: Is it your belief, and in implementing the policy in this school district under Section 21.031, that in order to participate in State funding, a student must have gained a lawful entry into this Country?
>
> A: Yes
>
> Q: Would it be fair to state that the policy of this school district would not allow a child to attend school, tuition-free, unless that child entered the United States lawfully?
>
> A: That's correct.
>
> [Reagan Deposition at 59-60; see also, Wheeler Deposition at 12].

The statute, as worded and apparently interpreted by school officials, appears to confuse legal admission with lawful immigrant status. However, under federal immigration law [8 U.S.C. §§1101 et seq.] legal admission to the United States is not necessary in order to gain lawful immigrant status. For instance, it is possible for an alien to have entered the United States without any permission from the I.N.S., to remain in the United States for at least seven (7) continuous years, and under certain prescribed circumstances, be granted permanent resident alien status [8 U.S.C. §1254 (a) (1); I.N.S. Opertions Instructions §§244.1 - 244.2(d); 8 C.F.R. §244; See also, Gordon and Rosenfield, Immigration Law and Procedure at §7.9]. It is also possible for an alien to be nondeportable after securing an entry into the United States by fraud or misrepresentation if that alien is related to a United States citizen or permanent resident alien. [See, 8 U.S.C. §1251(f); See also, O'Neill Deposition at 70]. An unlawful entry by an alien does not prevent that alien from becoming a permanent resident alien. [O'Neill Deposition 52]. In fact, I.N.S. District Director O'Neill stated that it has always been true that there are substantial number of permanent resident aliens in this country, particularly from Mexico and South America, who were previously here in this country in a deportable status. [Id. at 54]. [For other statutes, regulations and/or rules which allow aliens to permanently remain in the United States even though they were not "legally admitted", see e.g., 8 U.S.C.§§ 1253(h), 1254(a), 1255b, 1259; 8 C.F.R. §§108, 242.7, 242.17, 243.4, 244, 249; I.N.S. Operations Instruction §§242.1(a) (25), 242.10(a) (6), 244.4].

In recognition that many aliens gain a right to remain in the United States after an unlawful entry, defendants now allow certain alien children with Silva letters to attend the public free schools. [For an explanation of the Silva letter see p. 5 , supra].

Section 21.031 is overbroad on its face in that it excludes from the public schools alien children unless they were "legally admitted" into the United States. However, this criteria alone does not establish the legality of a child's presence in the United States. The statute is therefore not narrowly drawn and sweeps into its net children who in fact may not be deportable from the United States. No compelling or substantial government interest is served by this overbreadth contained in Section 21.031.

2. The challenged policy is overly broad since it excludes alien children who are entitled to remain in the United States.

The defendant, T.E.A., has apparently attempted to deal with the above described flaw in the statute by administratively defining "legally admitted" to mean "legally within" the United States. [Bowen Deposition at 92]. The defendant H.I.S.D. has dealt with this flaw be defining "legally admitted" to mean:

> One who has documentation that he or she is legally in the United States or a person who is in the process of securing documentation from the United States Immigration Service, and the service will state that the person is being processed and will be admitted with proper documentation. [Reagan Deposition at Exhibit 9].

There are several major problems with the administrative policy reflected by these definitions. First, they exclude alien children who are entitled to remain in the United States. Second, they exclude alien children prior to any federal ajudication of the lawfulness of their presence in the United States. [See, infra at36]. Third, they falsely assume that the I.N.S. can issue an advisory opinion as to the legality of an alien's status short of a due process hearing. [See, infra at 38].

Perhaps the most fatal deficiency of §21.031 as now interpreted by defendant T.E.A. and H.I.S.D. is that it excludes children from institutes formal proceedings against them and brings those proceedings to a final determination of deportability. And, I.N.S. does not institute such proceedings unless it also is seeking removal of the child's parents. The named plaintiff alien children have parents who are either United States citizens or permanent resident aliens. Thus, the named plaintiff alien children would not be subjected to expulsion proceedings and would be allowed to remain while their immigration petitions are being processed by the United States Consulate. It is a violation of due process and equal protection to deny these children access to tuition-free public education prior to I.N.S. reaching a final determination, after a due process hearing, that they are unlawfully present in the United States.

3. The challenged policy is overly broad since it excludes aliens prior to a determination of their alien status by the proper officials.

The legality of an alien's status can only be determined by an Immigration Judge in a deportation hearing unless the alien has waived his or her right to a hearing. [8 U.S.C. §1252; 8 C.F.R. §242; Judge Smith Deposition at 8 - 9, O'Neill Deposition at 41-42, 72]. An alien cannot be required to leave the country unless the alien has had a deportation hearing or waived his/her right to such a hearing. [Judge Smith Deposition at 8, 10, 18; O'Neill Deposition at 10, 12]. All aliens are entitled to a hearing to determine the lawfulness of their presence in the United States. [Judge Smith Deposition at 10]. The initiation of a deportation process does not mean that the alien is deportable, it merely means he is charged with deportability. [O'Neill Deposition at 13; Judge Smith Deposition at 6, 15, 57, 58]. Immigration Judge James R. Smith, during oral deposition testified as follows:

> Q: Is it correct that even though an Immigration Service Investigator believed a person to be in the United States in violation of law and sought the issuance of an order to show cause and even though a second I.N.S. agent thought that issuance of an order to show cause was justified, those acts do not automatically mean that the person is deportable from the United States?

> A: As far as I'm concerned, no.
>
> Q: And is that because an Immigration Judge may still find, for one or another reason, that the person is not deportable following a factual hearing on the matter?
>
> A: That's correct.
>
> Q: Now, assuming for a moment that a person has been found by an immigration judge to be deportable, what types of relief can that person seek from the immigration judge?
>
> A: We have at this moment Silva vs. Levy decision cases which, if the respondent had a priority date letter between certain dates, based upon the citizen child and if that person entered the United States on or before March 10th, 1977, they would not normally be deported.
> If the person had served two years honorably in the Armed Forces of the United States, under the §244(b), he could apply for suspension and be relieved of deportation. That way, if he had a continuous uninterrupted seven years presence at the time of the hearing, he would be advised he could apply for suspension of deportation under §244(1). If he had been here continuously since June 30, 1948, he could apply for a relief under §249; and if he had immediate visa availability and had the right family ties or a labor certification, he could apply for adjustment under Section 245. Those areas are all explored in the hearing. [Judge Smith Deposition at 15-16].

The Immigration Judge at a deportation hearing makes factual and legal findings as to the deportability of an alien. [Judge Smith Deposition at 6 and 18]. The alien is entitled to remain in the United States pending the completion of the deportation hearing and during the exhaustion of any administrative or judicial appeals. [Judge Smith Deposition at 26-28, 29; O'Neill Deposition at 32].

In the alternative, an alien can waive his or her right to a hearing and in exchange receive voluntary departure. [O'Neill Deposition at 10]. An alien is entitled to remain in the United States during the length of the voluntary departure. [O'Neill Deposition at 9-10, 30-31; Judge Smith Deposition at 26]. Voluntary Departure time can be extended by the District Director. [O'Neill Deposition at 24, 25, 29, 31]. Even upon the expiration of the voluntary departure time, the alien can revoke his or her waiver of a hearing and be granted a hearing. [O'Neill Deposition at 11-12].

Thus, except for aliens who have had a hearing before an Immigration Judge, the status of aliens who has seemingly violated a provision of the Immigration Act can only be described as "unsettled" since only an Immigration Judge can rule an alien deportable, subject to administrative, judicial and congressional review. [Judge Smith Deposition at 15]. The situation is analogous to the criminal law setting. Only a court, not a police officer, can convict and sentence a criminal. Here, H.I.S.D. and T.E.A. are presuming children to be unlawfully present in the United States before the child has had his or her day in court.

There is no presumption under law that aliens have entered the United States unlawfully. The burden of proof lies with the I.N.S. in an immigration hearing setting to prove unlawful entry and deportability. [Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Palmer v. Ultimo, 69 F.2d 1 (7th Cir. 1934)]. No deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts relied upon by I.N.S. are true. [Woodby v. I.N.S., 385 U.S. 276 (1966)].

Thus, the effect of the challenged state and school district policy is to deny tuition-free public education to alien children with an unadjudicated status. Since it is possible that once the alien's status is adjudicated, he or she may be allowed to remain, the state and school district should not be allowed to prejudge the lawfulness of a child's presence in the United States. Furthermore, to permit otherwise is, in plaintiffs' belief, to violate the supremacy clasue of Article VI of the U.S. Constitution since such state action is preempted by federal law.

4. The challenged policy is overly broad since it assumes that the I.N.S. can issue an advisory opinion as to the legality of an alien's status.

The H.I.S.D. policy provides that a child will be enrolled in the public schools if in possession of I.N.S. documentation which states that "the person is being processed and will be admitted with proper documentation." [See, supra page 34]. However, the Immigration Service has no formal structure for assisting the school districts in determining the eligibility of students for public education based on the alien status of a child. [O'Neill Deposition at 56-57, 70]. Indeed, the I.N.S. has taken a clear position that a school district should not exclude a child from public school based on a predetermination of the legality of the child's alien status. [See, Exhibit "L" for a true and correct copy of a statement made by the United States Commissioner of the Immigration and Naturalization Service on May 11, 1979 in Texas]. The H.I.S.D. policy further requires that an alien must have "documentation that he or she is legally in the United States." [See, supra at 34]. However, I.N.S. has no practice of certifying that someone is "legally in the United States." [O'Neill Deposition at 56-57, 66, 85-86]. The I.N.S. deals in terms of deportable versus non-deportable aliens since that is the methodology established in the Immigration Act. [8 U.S.C.§§ 1251-52]. Furthermore, an immigration official cannot give an advisory opinion as to whether an alien is deportable or not. Mr. Paul B. O'Neill, District Director of I.N.S., testified as follows:

> Q: Mr. O'Neill, am I correct in assuming that I.N.S. agents other than immigration judges are not empowered to make a decision as to the legality of a person's residence in the United States, and based upon the decision, to forcibly remove that person from the United States unless that person agrees to such removal under voluntary departure?
>
> A: That's correct...
>
> [O'Neill Deposition at 41].

Thus, the effect of the operation of the state and school district policy is to deny tuition-free public education to alien children with immigration documentation adequate for immigration purposes, but unsatisfactory to public school officials.

G. The State And School District Policy Violate Due Process Since They Fail To Provide An Adequate Administrative Procedure

Children who cannot prove to school officials that they are "legally admitted aliens", cannot, pursuant to §21.031 of the Texas Education Code, and §701.000 of the H.I.S.D. Administrative Procedures participate in the Available School Fund or attend tuition-free public education. The defendant T.E.A. has not required the school districts to establish a hearing procedure for issuance of determinations under §21.031. The defendant H.I.S.D.

has not established a hearing procedure to determine student eligibility under §21.031 of the Texas Education Code or §701.000 of the H.I.S.D. Administrative Procedures. [See, supra at pp. 5-6]. Section 701.010 of the H.I.S.D. Administrative Procedures indicates that once the Pupil Transfer Department has determined that the alien child is ineligible for tuition-free education, that department "will advise the parents or guardians of what steps should be taken in order to obtain eligibility for admission and enrollment." Plaintiffs have testified that in this regard, they were simply told to go to the U. S. Immigration Service. [Deposition of Maria Manzano at 90]. As noted above, I.N.S. can do nothing for them. No hearing is held to determine if the child is excludable, no testimony is taken under oath, there is no opportunity to cross-examine adverse witnesses, no burden of proof has been assigned, no standard of evidence has been established, no record is maintained, no advisement is given regarding the assistance of counsel, no presumptive period of enrollment is allowed, no information is provided concerning administrative appeal rights. [Deposition of Maria Manzano at 114-120; Deposition of Gaspar Garza at 32-35]. Plaintiffs believe these summary procedures violate procedural due process guarantees of the Fourteenth Amendment.

1. There is a property interest in attending public schools.

The Supreme Court held in Goss v. Lopez, 419 U.S. 565 (1975), that where a child is entitled to attend school, that entitlement becomes a property interest which cannot be taken away without adherence to the minimum procedural safeguards required by the due process clause of the Fourteenth Amendment. [Id. at 574]. Section 21.031 of the Texas Education Code does not state that undocumented aliens cannot attend Texas public schools. It merely states that these particular alien children are not entitled to participate in a specific state fund, namely the Available School Fund. Similarly, the H.I.S.D. Administrative Procedures does not state that undocumented aliens cannot attend Houston public schools. It merely states that these particular alien children must pay a specific tuition. [§§701.010(c), 701.110 of the H.I.S.D. Administrative Procedures] Indeed, aliens who are not "legally admitted" are not exempted from the Compulsory Attendance provisions of the Texas Education Code. [§§21.032 and 21.033]. However, plaintiffs, even though entitled and mandated to attend, have not been able to attend school because of the amount of tuition charged. Thus, the effect of the tuition rate has been to deprive the alien children plaintiffs of their entitlement to attend school. This deprivation should not be allowed to take place without adherence to the minimum procedural safeguards required by the due process clause of the Fourteenth Amendment. [*See*, *supra* at 9-10 for a discussion of the applicability of due process to undocumented aliens in general].

2. Plaintiffs are entitled to a procedure which includes adequate notice and a hearing.

Once it is determined that due process applies, the question remains what process is due. "At the very minimum, because there is a protected property or liberty interest involved, there must be *some* kind of notice and...*some* kind of hearing." [*Goss v. Lopez*, *supra*, 419 U. S. at 579]. The type of notice and the nature of the hearing is to be determined by reference to the balancing test set out in *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961). Under this test the interest of the state in providing something less than a full evidentiary hearing is balanced against the individual's interest in avoiding unfair or mistaken deprivation of property or liberty.

(a) Notice should be given

Due process would require that at least some sort of written notice as to the basis for the attempted exclusion should be given to the parents or guardians of the alien children. This notice should specify the particular deficiency in the immigration documents being presented by the aliens. It is not always clear what particular immigration documents are satisfactory to the school officials. For instance, neither superintendent Reagan or Mr. Wheeler, Director of Attendance and Transfer, could give plaintiffs a complete list of what particular immigration documents *are* acceptable to H.I.S.D. [Deposition of Reagan at 56-58; Deposition of Wheeler at 13-14]. Indeed, Mr. Reagan stated that although other less commonly utilized immigration documents might be acceptable to

H.I.S.D., he had not prepared nor had any knowledge that a written memorandum existed which listed these other less commonly utilized immigration documents. [Deposition of Reagan at 57-58]. Plaintiffs have testified that they unsuccessfully sought a written explanation for the denial to admit their children. [Deposition of Maria Manzano at 116-118; see also, Deposition of Gaspar Garza at 32].

(b) Presumptive period of enrollment should be allowed while child exhausts administrative procedures.

Due process would require that provisional enrollment of the alien child should be allowed pending the determination of whether the child can produce appropriate documents or a final administrative decision on the case.

T.E.A. has stated that if an undocumented alien child who is ineligible under §21.031 is enrolled in a public school for the entire year, but gains his/her acceptable documented alien status before or on the final day of school, the school district would be reimbursed for that child by T.E.A. for the entire year. [Deposition of Bowen at 34, 47, 50-51]. T.E.A. does this because they think it is fair and just. [Id. at 51]. H.I.S.D., on the other hand, presumes that a child is ineligible under §21.031 if the acceptable immigration documentation is not initially presented. The child remains excluded pending the exhaustion of administrative procedures. [Deposition of Reagan at 26-27].

(c) Some form of hearing should be provided

Plaintiffs have testified as to the swift and summary determinations of ineligibility to attend tuition-free public education made in their cases. [Deposition of Maria Manzano at 90, 112-120, 126-27; Deposition of Gaspar Garza at 16, 18, 32-35]. For instance, Mrs. Maria Manzano presented school officials with twenty-five (25) immigration documents and it took the officials about five minutes to rule her children ineligible. [Deposition of Mrs. Manzano at 118-119.]. Mr. Garza's interview with school officials lasted from ten to fifteen minutes. [Deposition of Mr. Garza at 34-35].

Immigration law is a highly complex subject matter. School officials are not trained to interpret immigration law or documents. Nor are they familiar with the protections that must be afforded a person whose immigration status may be in question. This determination is made, under immigration law, at a hearing to show cause why the person should not be deported. [8 U.S.C. §1252(b)]. To meet due process safeguards and protections, a deportation hearing must satisfy currently prevailing norms of fairness. [Sung v. McGrath, 339 U.S. 33 (1950)]. If an adverse decision is rendered, a respondent in a deportation hearing may seek administrative review by the Board of Immigration Appeals. [8 C.F.R. §§3.1(b), 242.21] Judicial review of Board of Immigration Appeals' decisions is also available. [8 U.S.C. 1105 a]. If a person is found to be deportable under Section 241 of the Immigration Act [8 U.S.C. 1251], relief from deportation may still be available from the Immigration Judge, immigration District Director, or through judicial order. [Judge Smith Deposition at 15-17, 29; O'Neill Deposition at 24-25, 29, 31].

The defendants emphasize that they are only interested in documentation that the alien has permission to be in the U. S. [Deposition of Bowen at 93-94; Deposition of Reagan at 56]. Yet T.E.A. has stated that they are totally unaware of the various categories that I.N.S. can place aliens into. [Bowen Deposition at 56] Mr. Bowen testified that he was unaware whether any of his subordinates had even attempted to delineate the various categories of aliens created in the Immigration Act. [Id. at 57]. H.I.S.D. has testified that their policy is to "respond to and react upon" the multitude of documentation presented by parents that were received from I.N.S. [Deposition of Reagan at 56-57]. However, the I.N.S. has a complex system of form [See appendix "M" for listing] which are applicable at different phases of the immigration process such as investigations, examinations, deportations, appeals, and naturalizations. These forms have their own special significance which are familiar to immigration officials, but hardly familiar to public school officials. If public school officials are to be permitted to scrutinize immigration documents, and to prejudge the legality of a child's status in this country, some formal setting for this determination should be available.

At a minimum, due process requires that a person be given notice and an opportunity to be heard before the disability is imposed. [Goss v. Lopez, 419 U.S. 565, 478-80 (1975); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971)]. The purpose of this requirement is to protect individuals from unfair or mistaken deprivation or a protected property interest. [Fuentes v. Shevin, 407 U.S. 67, 81 (1972)]. Such deprivations can be prevented only when a person has the opportunity to speak in his or her defense prior to the deprivation. [Goss v. Lopez, supra, 419 U.S. at 580.]

H. The Local School District Policy Violates State Law Since It Fails To Provide a Reasonable Procedure For Waiving The Tuition Fee.

It is the duty of the Texas legislature to establish and provide for the support and maintenance of an efficient system of public schools in the state. [Texas Constitution, Article VII, §1] In this connection, the Texas Legislature has enacted a provision regulating the manner and extent to which a fee may be charged by a school board of a pupil and his or her parent or guardian. [Texas Education Code Section 20.53 (V.A.T.S. sub. ch. 1978] Section 20.53(f) states:

> A school district shall adopt reasonable procedures for waiving a deposit or fee if a pupil and his or her parent is unable to pay it. This policy shall be posted in a central location in each school facility, in the school policy manual, and in the student handbook.

The H.I.S.D. has not adopted a procedure for waiving the tuition fee charged of alien students. It has also not posted the policy in a central location in each school facility, in the school policy manual, and in the student handbook. [For a discussion of the arbitrary and capricious rate of tuition charged by H.I.S.D., see, infra at 24].

IV.

Plaintiffs Will Suffer Severe And Irreparable Injury To Their Educational Psychological And Personal Well-Being Unless A Preliminary Injunction Issues

A. Legal Standard Applicable to Establishment of Irreparable Injury

A preliminary injunction is appropriate where there is a likelihood that plaintiff will suffer irreparable harm. A presently existing actual threat must be shown. [Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil §2948 (1973)]. The courts have found irreparable injury in a wide range of contexts. The following cases simply illustrate some of the situations in which the standard has been held to have been met. A preliminary injunction could be issued where irreparable harm arose by the loss by an athletic team of the services of a star athlete. [Boston Professional Hockey Ass'n., Inc. v. Cheevers, 472 F.2d 127 (1st Cir. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 304 F.Supp. 1193 (D.C. Cal. 1969), aff'd 419 F.2d 472 (9th Cir. 1969)], where sale of food by defendant was allegedly in violation of restrictive agreement prohibiting such use. [J.M. Fields of Anderson, Inc. v. Kroger Co., 310 F.2d 562 (5th Cir. 1962)], in the imminent induction into the armed services [Walsh v. Local Bd. No. 10, 305 F.Supp. 1274 (D.C. N.Y. 1969)], in the discharge of an army sergeant from armed services despite the right of reinstatment after administrative appeal [Crawford v. Davis, 249 F.Supp. 943 (D.C. Pa. 1966), cert. denied 383 U.S. 921 (1966)], in the possible termination, reduction or discontinuance of public assistance benefits prior to affording fair hearing [Hurley v. Toia, 432 F.Supp. 1170 (S.D. N.Y. 1977)]. In Doe v. Bellin Memorial Hospital, 479 F.2d (7th Cir. 1973), the court found irreparable injury where a woman was denied an abortion at a private hospital even though she could have traveled to another community and obtained the care she needed. The court emphasized that it was the quality, rather than the magnitude, of the potential harm which necessitated the injunction. [Id. at 759]. In Sockwell v. Maloney, 431 F.Supp. 1006 (D. Conn. 1976), aff'd 554 F.2d 1236 (2nd Cir. 1977), a class action was brought by present and future foster children whose foster care benefits would be reduced, discontinued, or terminated by a state agency in violation of the Fourteenth Amendment due process clause. On the issue of irreparable harm, the District Court stated:

> The irreparable harm that may arise from the summary deprivation of this property interest is clear. Foster children depend on foster care payments for their living essentials. Foster parents obligate themselves to care for these children on the assurance that they will receive support from the state. The reduction or termination of payments undoubtedly places a strain on the foster parent/foster child relationship. As a consequence, the child psychologically may feel less wanted and insecure in the foster home. The proof in the instant case revealed that the change from foster care to AFDC assistance resulted in the plaintiff children receiving over $300 a month less in financial aid. While not causing the children to be deprived of essential food, clothing, and shelter, this loss has materially affected their well-being. [431 F.Supp. at 1012].

Plaintiffs in the present case will show that the non-attendance in school by the plaintiff children and their proposed class members due to the denial of tuition-free public education has a severe psychological, cognitive and economical effect upon the child and the relationship between the child and his or her community is materially strained.

B. Importance of Education to the Well-Being of Children and Their Communities.

The courts have long viewed compulsory absenced from school with great concern and have imposed due process limitations on school officials expelling or suspending students for more than a few days. [See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (ten day suspension); Black Students of No. Fort Myers Jr.-Sr. H.S. v. Williams, 470 F.2d 957 (5th Cir. 1972) (ten day suspension); Shanley v. Northeast Ind. Sch. Dist., Bexar County, Tex., 462 F.2d 960, 967 n. 4 (5th Cir. 1972) (three day suspension)]. The United States Supreme Court in Goss v. Lopez, supra., stated:

> A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments" [citing *Brown v. Board of Education*, 347 U.S. 483 (1954)], and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. [419 U.S. 576].

The Congress has also expressed a great concern for the education of cildren, particularly low-income and educationally-deprived children. For instance, in its Declaration of Policy to the 1978 amendments to the Elementary and Secondary Education Act of 1965 [20 U.S.C. §2701] the Congress stated:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance to help meet the special needs of such children.

The crucial importance of education, particularly to children is well documented in countless research material. [*See*, *e.g.*, Frost, *EARLY CHILDHOOD EDUCATION REDISCOVERED* (1968); Bruner, *POVERTY AND CHILDHOOD* (1970); Mussen, *READINGS IN CHILDHOOD DEVELOPMENT AND PERSONALITY* (1970); Ilg and Ames, *CHILD BEHAVIOR FROM BIRTH TO TEN* (1965); Baldwin, *CHILD DEVELOPMENT* (1967); Robinson, *HUMAN GROWTH DEVELOPMENT* (1968)]. The consequences of a school-age child's absence from school can be severe and irreparable. Non-attendance can injure the child cognitively, psychologically, and economically. [Ibid., see also, Exhibit "N" for affidavits from six educational experts]. For instance, Dr. Jose A. Cardenas, a renowned educational expert, states:

> It is inconceivable that any child not participating in an elementary school education can subsequently develop the necessary skills for developing as an independent, self-sufficient adult. Any American suffering from such exclusion may be expected to be chronically unemployed, tremendously dependent upon society for meeting his basic physical needs, a drain and liability upon the economy, and a perpetual non-participant in the political process and the formulation of social policy...Non-participation in school leads to a cumulative deficit which becomes more difficult to rectify in proportion to the amount of time excluded from school. Exclusion for one-year period or longer may lead to a perpetual inability to perform school work. [Dr. Cardenas goes on to explain the basis for this conclusion. See, Exhibit "N"].

Eli Ginzberg in his book, THE UNEDUCATED (1953) wrote:

> Education is preparation for life, for work, and for citizenship...The ability of an individual to manage his life, to play a productive part in the economy, and to participate in the community are influenced considerably by the extent to which he has been exposed to and has absorbed the advantage of education. [Id. at 28].

The non-attendance in school can also effect the likelihood of juvenile delinquency. Dr. Gloria Zamora stated:

> An under-educated, under-skilled person is a prime candidate for unemployment and/or low-paying jobs...The sense of frustration felt by those unable to earn an adequate living often leads to the even more serious problem of crime. [Dr. Zamora's Affidavit, Exhibit "N"].

H.I.S.D.'s Superintendent Billy Reagan, stated that he had "read in literature reports of studies of increased incidents of delinquency and teenage pregnancy and those kind of social factors" as it relates to non-attendance in school. [Reagan Deposition at 50-51].

C. The Plaintiff Children Will Suffer Irreparable Injury

The plaintiff Manzano children have lost a year of education. Their father is a Mexican permanent resident alien with only a sixth-grade education. Their mother is a Mexican alien with only a third grade education. They simply are not capable of educating their children at home. [See Affidavit of Maria Manzano at Exhibit "O"]. The parents do not have the financial resources to pay public or private school tuition for the three Manzano children. [Ibid.] Throughout the time that the Manzano children were excluded from school, they were quite visibly upset and emotional. [Ibid.] They could not understand why their U.S. citizen brother and sister could attend public school while they could not attend school. [Ibid.]. Besides the psychological injuries, the plaintiff children face irreparable cognitive and economic injuries. [See, supra at 46-48 and Exhibit "N"].

The plaintiff, Veronica Palacios, has lost seven months of education. Her parents do not have the financial resources to pay public or private school tuition. [See, Affidavit of Gaspar Garza at Exhibit "P"]. Throughout the time that the plaintiff child was out of school, she was quite visibly upset and emotional. [Ibid.] She could not understand why her U.S. citizen half-sister could attend public school while she could not attend. [Ibid.]. Besides the psychological injuries, the plaintiff child faces irreparable cognitive and economic injuries. [See, supra at 46 and Exhibit "N"].

D. No Further Showing of Irreparable Injury is Necessary When a Constitutional Right is Involved.

Even though plaintiffs have made a strong showing of irreparable injury, when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary. [Planned Parenthood v. Citizens for Com. Action, 558 F.2d 861, 867 (8th Cir. 1977) (constitutional right of privacy involved); Illinois Migrant Council v. Pilliod, 398 F.Supp. 882, 904 (N.D. Ill. 1975), aff'd 540 F.2d 1062 (7th Cir. 1976) (Fourth amendment involved); Doe v. Bundy, 514 F.2d 1179, 1183 (7th Cir. 1975) (constitutional right of privacy involved); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969) (First amendment involved); Clemons v. Board of Education, 228 F.2d 853, 857 (6th Cir. 1956) (Fourteenth amendment involved); Lewis v. Delaware State College, 455 F.Supp. 239 (D. Del. 1978) (First amendment involved); Morial v. Judiciary Commission of State of L.A., 438 F.Supp. 599, 612-613 (E.D. La. 1977) (First amendment involved); Glenwal Development Corporation v. Schmidt, 336 F.Supp. 1079 (D. P.R. 1972) (due process and equal protection involved); Battle v. Municipal Housing Authority for the City of Yonkers, 53 F.R.D. 423, 429 (S.D. N.Y. 1971) (due process and equal protection - "Whenever constitutional rights as basic as those here asserted are denied, each day's damage is irreparable"); see also, Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil §2948 (1973) at 440]. The Court in Lewis v. Delaware State College, 455.F. Supp. 239 (D. Del. 1978) stated:

> However, the Court finds...the plaintiff's strong showing of probably success on the merits of her claims that she has been deprived of her constitutional rights of privacy, substantative due process and equal protection is sufficient to establish the likelihood of irreparable harm. [Id. at 251]

Plaintiffs have made a strong showing that their constitutional rights to due process and equal protection have been denied. Therefore, plaintiffs have established the likelihood of irreparable harm and issuance of a preliminary injunction is appropriate.

V.

The Threatened Injury To Plaintiffs Outweighs Any Threatened Injury To The Defendants

A second factor to consider if a preliminary injunction is appropriate is whether the threatened injury to plaintiffs outweighs any threatened injury to the defendants. [Buchanan v. U.S. Postal Service, 508 F.2d 259, 266 (5th Cir. 1975)]. The threatened injury to defendants, the State and H.I.S.D. does not outweigh the threatened injury to plaintiffs.

The T.E.A. is in charge of distributing the $21.031 Available

School Fund money to individual school districts. [See, Bowen Deposition]. T.E.A. exercises no discretion in the amount allocated since it is uniform and mathematically computed. [Id. at 84].

> The Available School Fund is divided by the number of children. When you add up the number of dollars you have, you divide in the number of children (in the state) and you issue the money on a per capita basis to all children wherever they are, in elementary institutions, in budget balanced districts, wherever they are. [Id. at 82].

There is no surplus or deficit in the Available School Fund since all of that fund is given away each year regardless of the number of children. [Ibid.]. Thus to allow plaintiff children to participate in the Available School Fund would not seriously injure the state. Indeed, T.E.A. would not have to spend funds for auditing a school district's compliance with the alienage provisions of §21.031.

The injury to H.I.S.D. does not outweigh the injury to the plaintiff children. H.I.S.D. has no basis for estimating the number of children excluded by their policy pursuant to §21.031. [See, supra at 21-24]. The I.N.S. District Director has previously stated in writing that I.N.S. statisticians do not make predictions on the number of undocumented aliens, as any such prediction cannot be supported by fact. [A true and correct copy of this writing is hereto attached as Exhibit "U" and incorporated herein by this referance]. This position was reiterated by District Director O'Neill in oral deposition. [O'Neill Deposition at 38-40]. In response to plaintiffs question as to how many alien children in the Houston District [which covers thirty counties (O'Neill Deposition at 4)] have been apprehended, placed on docket control, given voluntary departure or deportation, he stated:

> As a result of your request in the subpoena, I have spent considerable effort and time, and at no small expense, attempted to get some figures for you that would indicate how many persons of certain age groups are under docket control. And what I have arrived at is with children that are between the ages of -- well, who were born between the dates of 1961 and December 31st of 1972, we have a total of 911 children under docket control that falls within that category. And those children who were born after January of 1973 through the present time, we have a total of 241. That makes a total of 1,152 children. [O'Neill Deposition at 40].

H.I.S.D. had a total student population of 201,960 for the 1978 school term. [See, Exhibit "Q"].

H.I.S.D.'s potential injury does not outweigh the injury to plaintiffs since the cost of educating these additional children is not relatively great. As previously discussed, H.I.S.D. has incorrectly assessed the cost of educating an ineligible child. [See, supra at 24-25]. Assuming that defendants would have to educate.

5,000 additional children in public schools, the actual loss in state revenues would be $650,000 [5,000 x $130], which represents 0.2% of the total H.I.S.D. revenues and 1.7% of the total per capita approtionment [See, Exhibit "R".].

H.I.S.D. also claims it could be forced to spend an additional $452.41 per student for each one eligible to participate in federal assistance programs. [See, supra at 25]. However, the revenues from these programs do not come from the Available School Fund and would not be affected by Section 21.031. Furthermore, none of these federal monies are conditioned on the alienage of the child. [Bowen Deposition at 87]. Therefore, H.I.S.D. would not make any expenditure under any of these programs for which it does not receive compensation from the federal government.

It should also be noted that preliminary figures show H.I.S.D. ending the current school year with a $16 million surplus. [See, "Public Hearing Thursday on H.I.S.D. Budget Proposal," HOUSTON POST July 17, 1979, Page 2A].

Defendant H.I.S.D. has previously estimated that it only turns away a few hundred students each year due to the alienage provisions of §21.031. [See, supra at 22 - 23]. This number will not significantly have impact on the school system if enrolled tuition-free. However, inasmuch as plaintiffs only seek a preliminary injunction herein, defendants could easily monitor the number of alien children enrolling in their schools as a result of any order issued by this Court and could report back at monthly (or other) intervals as to the extent of their alleged financial losses. This Court certainly retains the equitable power to modify any preliminary injunction order if defendants are later able to show a substantial injury because of any order issued herein.

VII.

Issuance Of The Preliminary Injunction Will Protect The Public Interest

Finally, the question of where the public interest lies is on the side of the plaintiffs. An educated populace is the basis of our democratic institutions. A denial of educational opportunities is repugnant to our notions that an informed and educated citizenry is necessary to our society. This interest was clearly articulated by the Supreme Court in *Brown v. Board of Education*, 374 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) where it was stated:

> "Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in perparing him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where that state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. at 493.

And specifically in Texas, "a free public education is not simply a privilege; it is a right guaranteed by the Texas Constitution." [*Karr v. Schmidt*, 320 F.Supp. 728 (W.D. Tex. 1970) rev'd on other grds, 460 F.2d 609 (5th Cir. 1972)].

Furthermore, as previously discussed, children who are not in school have a tendency to become involved in juvenile delinquency and other social problem activities. [*See*, *supra* at 48]. The public interest is *not* served by keeping these children out of school.

VIII.

CONCLUSION

Plaintiffs have met their burden in this case. They have shown that they will suffer irreparable injury if they continue to be excluded from school until the case can be set for trial and finally resolved. Plaintiffs have already missed a year of school and each missed day of school that continues will irreparably affect the educational, psychological and personal well-being of these children. Defendants, on the other hand, will not suffer substantial harm should the preliminary injunction issue. Compared to the total student population, there are not many plaintiff children involved. Furthermore, an injunction against T.E.A. would allow H.I.S.D. to receive state aid for the plaintiff children which is not presently available. Plaintiffs have also made a strong showing that they will prevail on the merits. Constitutional law and state and federal statutory law indicate that plaintiffs have unjustly been denied tuition-free public education. Finally, a preliminary injunction would not be contrary to the public interest since any incremental cost in providing schooling to the children in question would be relatively small and the public interest demands a just adjudication of the status of these children. For the above reasons and so that justice might be done, plaintiffs urge the court to grant them a preliminary injunction.

Respectfully submitted,

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September 7, 1979

Patricia Howard
Clerk of the Panel
Judicial Panel on Multidistrict Litigation
1030 15th Street, N.W.
320 Executive Building
Washington, D.C. 20005

RE: DOCKET No. 398

Dear Ms. Howard:

Please find enclosed the original and eleven (11) copies of the Plaintiffs Response to Defendants' Motion to Consolidate Cases, which we ask you to file in behalf of the plaintiffs in Civil Action Nos. H-78-2132, H-78-1862, H-78-1797, and H-78-1831 now pending in the United States District Court for the Southern District of Texas, Houston Division.

Copies of this pleading are being mailed to those attorneys at the addresses shown on the Certificate of Service, and to the Clerks of Court listed.

Respectfully yours,

Isaias D. Torres

ENCLOSURES
EXPRESS-MAIL DELIVERY

A Project of the Community and the Gulf Coast Legal Foundation

APPENDIX E

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO CONSOLIDATE CASES

DOCKET NO. 398

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

SANDRA CARDENAS, ET AL V. DR. LEE MYERS, Superintendent, Pasadena Independent School District, ET AL	C.A. H-78-1862
GASPER GARZA, ET AL V. BILLY REAGAN, Superintendent, Houston Independent School District	C.A. H-78-2132
MAYRA MARTINEZ, ET AL V. BILLY REAGAN, Superintendent, Houston Independent School District, ET AL	C.A. H-78-1797
ELVIA MENDOZA, ET AL V. DR. JOHNNIE CLARK, Superintendent, Goose Creek Consolidated Independent School District, ET AL	C.A. H-78-1831

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

A. BOE, ET AL)
)
V.)
)
LINUS WRIGHT, Superintendent, Dallas Independent School District,)
ET AL) C.A. 3-79-0440-D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

J. AND R. ROE, ET AL)
)
V.)
)
WILLIAM HOLM, Superintendent, Ector County)
Independent School)
District, ET AL) C.A. MO-79-CA-49
)
JOAQUIN, JIMMY AND)
RODRIGO COE, ET AL)
)
V.)
)
WILLIAM HOLM, Superintendent, Ector County)
Independent School)
District, ET AL) C.A. MO-79-CA-54

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

MIDLAND-ODESSA DIVISION

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO CONSOLIDATE CASES

TO THE HONORABLE JUDGES OF THE PANEL:

COME NOW plaintiffs in the causes referred to as Cardenas, et al v. Myers, et al, Civil Action H-78-1862; Garza, et al v. Reagan, et al, Civil Action H-78-2132; Martinez v. Reagan, et al, Civil Action H-78-1797; and Mendoza, et al v. Clark, et al, Civil Action H-78-1831 [hereinafter referred to as the "Southern District of Texas Cases"] and file this their response to the Motion to Consolidate submitted by the State of Texas and the Texas Education Agency.

I.

INTRODUCTION AND PROCEDURAL POSTURE OF THE LITIGATION

A. The Southern District of Texas Cases

The Southern District of Texas plaintiffs in their actions for declaratory and injunctive relief challenge the following practices: (1) exclusion of plaintiff children by defendants State of Texas and Texas Education Agency from participating in the Available School Fund of the State of Texas pursuant to the alienage provisions of §21.031, Texas Education Code [A true and correct copy of §21.031 is attached hereto as Exhibit "A" and is incorporated herein by this reference]; (2) exclusion of plaintiff children by defendant school districts from participating in a tuition-free public education pursuant to the alienage provisions of their local and particular admission policies [A true and correct copy of these admission policies is attached hereto as Exhibit "B" and is incorporated herein by this reference]; (3) establishment of arbitrary tuition fee levels and failure to waive tuition fees for indigent alien children by individual school districts; and (4) failure to provide a due process administrative hearing or procedure to plaintiff children excluded from a tuition-free public education solely because of their alien status. Plaintiffs allege that these practices violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the Supremacy Clause of Article VI to the U.S. Constitution, the Universal Declaration of Human Rights adopted by the United Nations, the Protocol of Buenos Aires, and Section 20.53 of the Texas Education Code. [A true and correct copy of one of plaintiffs' second amended complaint is hereto attached as Exhibit "C" and is incorporated herein by this reference].

As indicated below, these cases have undergone extensive pre-trial discovery. Two pre-trial hearings have been held and some of the cases have already had a pre-trial conference. All four of the Sourthern District of Texas Cases are pending before the Honorable Woodrow Seals. Plaintiffs' motion for preliminary injunction and request for a hearing in open court are currently pending in all of the Sourthern District of Texas Cases. To date, the Judge has entered an order by which the defendant Houston Independent School District has agreed to allow the named plaintiff children to be admitted into school pending a trial on the merits. [A true and correct copy of this order is hereto attached as Exhibit "D" and is incorporated herein by this reference].

B. Other Pending Cases

Roe, et al v. Holm, et al, Civil Action MO-79-CA-49 and Coe, et al v. Holm, et al, Civil Action MO-79-CA-54 [hereinafter referred to as the"Western District of Texas Cases"] are pending in the Western District of Texas, Midland-Odessa Division. These cases challenge the constitutionality of the alienage provisions of §21.031, Texas Education Code, and the constitutionality of excluding children from a tuition-free public education based on alienage. The judge in the Western District of Texas Cases has recently enterdd a class wide preliminary injunction whereby the Texas Education Agency is enjoined from denying based on alienage access to the Available School Fund and the Ector County Independent School District is enjoined from denying based on alienage access to tuition-free public education. [A true and correct copy of this order is hereto attached as Exhibit "E" and is incorporated herein by this reference].

Boe, et al v. Wright, et al, Civil Action 3-79-0440-D [hereinafter referred to as the"Northern District of Texas Case"] is pending in the Northern District of Texas, Dallas Division. This case challenges the constitutionality of the alienage provisions of §21.031, Texas Education Code, and the constitutionality of excluding children from any form of public education based on alienage. The Judge in the Northern District of Texas Case recently granted plaintiffs' motion for class certification. A hearing on a class wide preliminary injunction is currently being held by the Judge in that case.

II.

PLAINTIFFS DO NOT OPPOSE CONSOLIDATION OF CASES PENDING AGAINST DEFENDANTS STATE OF TEXAS AND TEXAS EDUCATION AGENCY

There are presently seven federal suits against the defendants State of Texas and Texas Education Agency pending in the Southern, Northern and Western Districts of Texas which involve common questions of fact. Plaintiffs agree that consolidation for transfer purposes under 28 U.S.C. §1407 would be for the convenience of parties and witnesses and would promote the just and efficient conduct of the claims against the defendants State of Texas and Texas Education Agency.

III.

PLAINTIFFS OPPOSE CONSOLIDATION OF CASES PENDING AGAINST THE INDIVIDUAL SCHOOL DISTRICT DEFENDANTS

A. Consolidation and Transfer Is Improper Since There Are Common Questions of Law But Not Of Fact

Consolidation and transfer under §1407 is improper unless there are common questions of fact. [*In re United Gas Pipe Line Co. Litigation*, 391 F.Supp. 774 (Jud.Pan.Mult.Lit. 1974); *In re Air Crash Disaster Near Natchitoches Parish, Louisiana*, 391 F. Supp. 765 (Jud.Pan.Mult.Lit. 1973)]. There is a common question of law as it pertains to the individual defendant school districts namely whether the exclusion of certain aliens from tuition-free public education violates the U.S. Constitution, international treaties, and state statute. However, there are different questions of fact involved since(1) the individual school districts have different exclusionary policies; (2) the characteristics of plaintiffs are different; and (3) the population size being affected by the exclusionary policies are different.

The individual school districts involved as defendants in the various district court cases have different exclusionary policies. For instance the school district in the Northern District of Texas Case has a policy of completly excluding certain alien children from public education without affording these children access to paying a tuition fee. The other school district defendants do require a tuition fee, but the level varies from school district to school district. Furthermore, the school district definition of "legally admitted" aliens varies from school district to school district (as can be seen in Exhibit B). This discrepancy is a result of a lack of uniform statewide enforcement of §21.031, Texas Education Code. Secondly, the characteristics of the plaintiffs varies from case to case. In some cases the plaintiff children are in the process of obtaining immigration law documentation and are by local practice of Immigration & Naturalization Service District offices immune from deportation even though the school district has found them to be aliens not "legally admitted.' In other cases, the plaintiff children are presently undocumentable. Factually there is a need to examine the local policy of the Immigration & Naturalization Service and each of the Southern, Northern and Western District of Texas Cases are located within a different district office of the Immigration & Naturalization Service. Lastly, the population size which is affected by the individual school district exclusionary policies is different. The population size involved in the Western District of Texas Cases (Midland-Odessa, Texas) is quite similar to another case which is pending before the Fifth Circuit Court of Appeals, Doe v. Plyler, No. 78-3311, lower court decision found at 458 F.Supp. 569 (E.D. Tex. 1978) (Tyler, Texas). On the other hand, the population size in the Northern and Southern District of Texas Cases are relatively larger than those in the other cases.

The moving party is under a heavy burden to show not only that there are common questions of fact, but also that those common questions are sufficiently complex and that the accompanying discovery will be so time consuming as to justify transfer under §1407. [In re 21st Century Products Contract Litigation, 448 F.Supp. 271 (Jud.Pan.Mult.Lit. 1978); In re Buffalo Valley Gas Authority Litigation, 429 F.Supp. 1029 (Jud.Pan.Mult.Lit. 1977)]. The individual defendant school districts have failed to meet that burden.

B. Consolidation and Transfer is Improper Since Substantial Pre-Trial Discovery Has Been Compeleted

The purpose of 28 U.S.C. §1407 has been described as follows

> The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the just and efficient conduct of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management. [House Rep. No.1130, 90th Cong.,2d Sess.2, reprinted in 1968 U.S. Code Cong. & Admin. News, pp. 1898, 1899-1900].

Consolidation and transfer under §1407 is improper where discovery has already progressed quite far in one or more of the actions. [In re Upjohn Antibiotic Liability Litigation, 450 F.Supp. 1168 (Jud.Pan.Mult.Lit. 1978); In re "Lite Beer" Trademark Litigation, 437 F.Supp. 754 (Jud.Pan.Mult.Lit. 1977); In re Royal Typewriter Co. Breach of Warranty Litigation, 435 F.Supp. 925 (Jud.Pan.Mult. Lit. 1977); In re Lehman Equip. Co. Patent Infringement Litigation, 360 F.Supp. 1402 (Jud.Pan.Mult.Lit. 1973]. Plaintiffs in the Southern District of Texas Cases have already completed substantial pre-trial discovery. The complaints in the Southern District of Texas Cases were filed in September and November of 1978. Plaintiffs in the Southern District of Texas Cases were deposed by defendants on November 2, 1978, November 10, 1978, November 22, 1978, January 10, 1979, January 18, 1979, February 1, 1979, February 7, 1979, and February 10, 1979. Defendants in the Southern District of Texas Cases were deposed by plaintiffs on December 5, 1978, January 8, 1979, January 9, 1979 and February 7, 1979. Plaintiffs also deposed U.S. Immigration officials on July 12, 1979. Defendant Houston Independent School District has recently given notice to plaintiffs that they wish to re-depose plaintiffs on September 13,1979

Furthermore, defendant Houston Independent School District has served plaintiffs with their first set of interrogatories and request for production of documents. Thus, substantial pre-trial discovery has been completed and is presently undergoing and the purpose of §1407 is not served by consolidating cases which have already undergone substantial pre-trial discovery.

C. Consolidation and Transfer Is Improper Since Some of the Cases Are Near to Trial

28 U.S.C. §1407, on its face, does not change the place of trial of any of the cases that may be consolidated or transfered. [*See*, Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §3862]. The legislative history supports this position.

> The proposed statute [§1407] affects only the pre-trial stages in multidistrict litigation. It would not affect the place of trial in any case... [House Rep. No. 1130, 90th Cong.,2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News, P. 1898].

Consolidation and transfer under §1407 is improper where some of the cases are proceeding expeditiously and are near trial. [*In re Ortho Pharmaceutical Liability Litigation*, 447 F.Supp. 1073 (Jud. Pan.Mult.Lit. 1978); *In re Midwest Milk Monopolization Litigation*, 441 F.Supp. 930 (Jud.Pan.Mult.Lit. 1977); *In re Olympia Brewing Co. Antitrust Litigation*, 415 F.Supp. 398 (Jud.Pan.Mult.Lit. 1976)]. Plaintiffs in the Southern District of Texas Cases have had two (2) previous pre-trial hearings. A hearing was held in November 197 on a motion to consolidate cases within the Southern District of Texas for purposes of pre-trial discovery only. [A true and correct copy of the order entered in this hearing is hereto attached as Exhibit "F" and is incorporated herein by this reference]. A hearing was held on June 25, 1979 on defendant school district's motion to quash plaintiffs' notice of oral deposition. [No written order was entered in this hearing]. Furthermore, a pre-trial conference was held in two of the Southern District of Texas Cases on August 21, 1979. The Judge granted plaintiffs' second amended complaint, scheduled the briefing of the class action allegation and stated that trial on the merits would take place after December 1, 1979. [A true and correct copy of this order is attached as Exhibit "G" and is incorporated herein by this reference]. Thus, some of the cases are too advanced and near trial for any need to resort to a §1407 transfer. Such a transfer would only serve to delay a trial on the merits. Until a trial on the merits has been held, many children will continue to be exluded from a public education.

D. Consolidation and Transfer Is Improper Since Important Motions Are Under Submission

Consolidation and transfer under §1407 is improper where an important motion is under submission in one of the original courts. [In re L.E.Lay & Co. Antitrust Litigation, 391 F.Supp. 1054 (Jud.Pan.Mult.Lit. 1975)(pending motion for preliminary injunction); In re Helicopter Crash Near Cameron, Louisiana, 443 F.Supp. 1022 (Jud.Pan.Mult.Lit. 1976)(up coming pre-trial conferences and trial setting]. Unlike the other cases within the Southern District of Texas , the Garza and Martinez cases have several important motions pending which were filed by the school district. The defendant school district presently has pending motions to dismiss plaintiffs complaint based on the doctrines of ripeness, exhaustion of administrative remedies, abstention, and res judicata. The district court has yet to rule on these motions even though they have been fully briefed. It would not promote the just and efficient conduct of these matters if a consolidation and transfer of the defendant school district were to take place under §1407.

E. Consolidation and Transfer Is Improper Since a Case Is Pending Before the Court of Appeals Which May Have A Substantial Effect on the Resolutions of These Cases

Another factor weighing against consolidation and transfer under §1407 is the likelihood that a ruling by a Court of Appeals may have a substantial effect on the resolutions of these cases. [In re American Home Products Claims Litigation, 448 F.Supp. 276, 278 (Jud.Pan.Mult.Lit. 1978); In re "Lite Beer" Trademark Litigation, 437 F.Supp. 754,755 (Jud.Pan.Mult.Lit. 1977); In re U.S. Navy Reenlistment Litigation, 407 F.Supp. 1405, 1407 (Jud.Pan.Mult.Lit. 1976)]. The Fifth Circuit Court of Appeals presently has pending before it a case with similiar issues as those involved in the Southern, Northern, and Western District of Texas Cases. [Doe v. Plyler, No. 78-3311]. The district court ruling in Doe held the

CERTIFICATE OF SERVICE

I, ISAIAS D. TORRES, do certify that a true and correct copy of the foregoing Response to the Motion to Consolidate has been properly served by mailing copies of same in the United States Mail, Certified, Return Receipt Requested, addressed to the Clerk of the United States District Court for the Southern District of Texas, Houston Division; Mr. Kelly Frels, 2900 South Tower Pennzoil Place, Houston, Texas 77002 (attorney for defendants in No. H-78-2132 and H-78-1797); Mr. Richard Peebles, P.O. Box 809, 1515 North Alexander Drive, Baytown, Texas 77520 (attorney for defendants in No. H-78-1831); Mr. Stanley Baskin, P.O. Box 72, 509 First Pasadena State Bank Building, Pasadena, Texas 77501 (attorney for defendants in H-78-1862); Mr. Joseph J. Rey, P.O. BOX 10187, El Paso, Texas 79992 (attorney for plaintiffs in No. MO-79-CA-54); Mr. Warren Burnett, P.O. Box 3707, Odessa, Texas 79760 (attorney for plaintiffs in No. MO-79-CA-49); to the Clerk of the United States District Court for the Western District of Texas, _idland-Odessa Division; Mr. Al Campos, 810 Main Street, Suite 320, Dallas, Texas, 75202, (attorney for plaintiffs in No. CA-3-78-o44-D); Bowen Florsheim, 4050 First National Bank Building, Dallas, Texas 75202 (attorney for defendants in No. CA-3-79-0440-D); to the Clerk of the United States District Courtfor the Northern District of Texas, Dallas Division, and to Jack Tidwell, P.O. Box 1311, Odessa, Texas 79760 (attorney for defendants in No. MO-79-CA-49 and MO-79-CA-54); and to Susan Dasher, Assistant Attorney General, P.O. Box 12548, Austin, Texas 78711 on this 7th day of September, 1979.

ISAIAS D. TORRES

state statute, §21.031 of the Texas Education Code, and the local school district policy to be in violation of the U.S. Constituion. [Doe v. Plyler, 458 F.Supp. 569 (E.D.Tex. 1978)]. Thus, it would be unwise to order a transfer of cases under §1407.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs in the Sourthern District of Texas Cases oppose consolidation of the individual school district defendants, but would not oppose a consolidation of the defendants State of Texas and Texas Education Agency.

Respectfully submitted,

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